The Goodyear Tire & Rubber Company-Beaumont Chemical Plant and Transportation Unlimited, Inc. and The Goodyear Tire & Rubber Company-Beaumont Chemical Plant; Transportation Unlimited, Inc.; and Ryder Truck Rental, Inc., Wholly-Owned Subsidiaries of Ryder System, Inc. *and* Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers Helpers Local Union No. 920, affiliated with International Brotherhood of Teamsters, AFL–CIO. Cases 16–CA–14820 and 16–CA–14838

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 10, 1993, Administrative Law Judge James M. Kennedy issued the attached decision. The Charging Party filed exceptions and a supporting brief, and Respondent Transportation Unlimited filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In adopting the judge's finding that no unlawful refusal to bargain over effects has occurred, we note that the Union must act with due diligence to preserve its request to bargain. Here, where there was discussion but no agreement on a future date to engage in effects bargaining, prudence dictates that the Union follow up on its demand. The Union's subsequent silence indicates a lack of due diligence. See, e.g., *Golden Bay Freight Lines*, 267 NLRB 1073, 1080 (1983).

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case came on for hearing before me in Port Arthur, Texas, on January 22, 1992, and continuing for 14 hearing days until the General Counsel and the Charging Party completed their cases-in-chief on April 9, 1992. When they rested, all Respondents orally moved to dismiss the fourth amended consolidated complaint, principally on the ground that the General Counsel had failed to make out a prima facie case, although at least one respondent also argued that a portion of the complaint is barred by Section 10(b) of the Act, the 6-month statute of limitations. I advised the parties that it seemed likely that the Respondents' assertions were borne out by the record, but that it was too large to permit ruling at the hearing. Even so, I observed, the state of the evidence was such that the motions deserved serious and thoughtful consideration. Accordingly, I adjourned the hearing pending the filing of such written motions, setting a schedule for both their filing and for the responses of the General Counsel and the Charging Party.

Respondents' motions were filed on June 15, 1992, and the General Counsel's and the Charging Party's responses were filed on August 27, 1992. The General Counsel's response encompassed a motion to receive additional evidence; it also referred to a document contained in a prehearing motion, found in the formal file, but which had not been offered or received in evidence. Subsequently, the Ryder Respondents filed a motion to strike those portions of counsel for the General Counsel's response which seek to expand the record which he made at the hearing. Counsel for the General Counsel filed an opposition; the Ryder Respondents followed with a second motion to strike. These will all be dealt with in this decision.

I. BACKGROUND AND ISSUES

The operative complaint in this matter (the fourth amended consolidated version) asserts that all the Respondents are joint employers for purposes of the Act. The Respondents deny that contention. Indeed, Respondents' vigorous defense on the point began with a pretrial summary judgment proceeding seeking a declaration that they were not joint employers. In support of that contention they offered affidavits, copies of contracts, and other materials; the General Counsel countered with affidavits and legal argument.

In my Order denying the Motions for Summary Judgment I observed the evidentiary differences were not particularly great and that on full hearings the Board has found similar evidence offered by the General Counsel to be wanting insofar as the final burden of persuasion was concerned. Nonetheless, because there were some discrepancies regarding the claims of supervision, scheduling, and hiring which could not be resolved in favor of Respondents without a hearing, I denied the motions. After 14 days of trial, however, it has become apparent that counsel for the General Counsel's evidence on those issues is less than compelling. Indeed, his legal argument leaves much to be desired as well, for he has even cited some overruled authority in support of his position.

The factual background is not in significant dispute. The Goodyear Tire & Rubber Company (Goodyear)[1] is alleged to be the principal employer. It operates a chemical plant in Beaumont, Texas, where it ships and receives products by truck. Prior to 1985 it operated a fleet of chemical tank trucks which it had leased. It directly employed the drivers who drove those vehicles. The primary chemical being hauled is isoprene, a chemical component of synthetic rubber. That chemical is hazardous and highly flammable. Under the rules and regulations of the State of Texas as administered by the Texas Railroad Commission, Respondent's hauling of that product was permitted only under a permit known as a ''private carriage'' operation. A private carriage permit is to be distinguished, among other things, from the permits granted to common carriers.

Goodyear reached a business decision, sometime in 1985, to change the method of its operation pending a conversion

[1] The caption has been amended to reflect both Goodyear's and Ryder System, Inc.'s correct names.

to hauling by a common carrier. As the first step in that direction, it determined to substitute leased drivers for its own employees. In addition it also determined that it would be appropriate to rid itself of the direct responsibility for vehicle dispatching. Accordingly, it entered into an agreement with Respondent Ryder Distribution Resources (RDR) to run what amounted to a truck terminal within the plant. RDR is a subsidiary of Ryder System, Inc.,[2] as is a sister company, Respondent Ryder Truck Rental, Inc. (Ryder Truck). Goodyear already had an ongoing business relationship with Ryder Truck, for that was the entity from which it leased the tank vehicles. Ryder Truck also operates a maintenance yard in Beaumont located about 2 miles from the Goodyear plant.

The evidence shows RDR was initially expected to provide the leased drivers to operate the trucks as well as to dispatch them. To do that, however, RDR needed to have permission from the Texas Railroad Commission to perform the intrastate isoprene hauls which Goodyear's private carriage operation entailed. Because RDR was unable to obtain permission from the Texas Railroad Commission to do so, Goodyear contracted with another driver leasing company which did have permission, Respondent Transportation Unlimited, Inc. (TU). These three Respondents are unrelated to one another, except for their Goodyear-Beaumont connection.

In the summer of 1985, RDR hired as its manager Goodyear's dispatcher Bill Navarre. He was, of course, familiar with the Goodyear plant and its driving needs.

In August 1985, Navarre, together with TU Vice President Dennis Negrey as well as some Ryder Truck personnel, conducted interviews at a Beaumont hotel in order to hire the drivers to be leased to Goodyear. I think it is fair to say that at this stage, Goodyear, TU, and RDR all held the belief that TU's presence at the plant would be short-lived. Indeed, there is evidence that the drivers who were hired were told that they would shortly become ''Ryder'' employees. At that time a Ryder subsidiary began seeking state authority to operate intrastate.

Nonetheless, the new hires all filled out TU application forms and were placed on the TU payroll.

Eventually, on July 7, 1986, the Texas Railroad Commission denied the Ryder subsidiary's application to perform intrastate leased driving services. In the early part of that year, TU, in place as the lessor, had begun taking steps to provide greater control over its operation than it previously had. Before that time Negrey appeared to be in charge of the drivers but communicated with them only on an uncertain basis from his office in Cleveland, Ohio. However, beginning in early 1986, TU placed a regional manager in the Dallas area, Jack Painter. In addition, Negrey, at the drivers' request, had earlier published a set of drivers' rules on TU letterhead which he posted at the Goodyear dispatch office, now occupied by RDR and its dispatchers. It also had provided the drivers with telephone pagers and a toll-free telephone number by which they could immediately get in touch with Negrey and later, Painter. In 1990 Jerry Parrish replaced Painter as TU's regional manager.

The actual dispatching continued to be performed from the Goodyear plant, but by RDR. Navarre not only assumed management of the RDR dispatching operation, he was rather quickly asked to serve as an RDR district manager. His duties for that firm were expanded well beyond the confines of the Goodyear plant. Accordingly, he was often absent performing duties at other locations where RDR had contracts with other customers. He had already hired a clerical staff who did the actual dispatching. With his new duties pressing him, he had to hire an assistant. The assistant appears to have been primarily involved in the day-to-day operations of the dispatching office. Over the 5 plus years during which RDR operated that office, Navarre had a succession of assistants including David Bienvenu and Harold Flanary. At any given time there were about four dispatchers on the staff. As the office operated 24 hours per day, at least one dispatcher was always on duty.

The Charging Party, Teamsters Local 920 (the Union) did not appear on the scene until April 19, 1990, when it filed a petition for an election of the TU drivers based at the Goodyear plant. A stipulation for consent election was signed, approved by the Regional Director, and an election was held on June 6 and 7. The Union won in an unremarkable election and on June 18, 1990, was certified as the collective-bargaining representative of TU's drivers based at the Goodyear plant. Even though Union Official Sergio Ponce was aware in general terms of the relationship between the three companies, he chose to seek certification only of the TU employees and did not contend during the representation proceeding that the certification should also run to either Goodyear or Ryder.

After the certification, TU's Negrey and Ponce, accompanied by a small committee of drivers, met to engage in collective bargaining. Neither Goodyear nor Ryder sent any representative to participate in the collective-bargaining negotiations.

At a negotiation meeting on October 16, 1990, TU's Negrey informed Ponce that he had heard a rumor that United DSI, a common carrier, had given a bid to Goodyear to haul the isoprene at Beaumont.[3] A little over a month later, Goodyear gave TU the formal 30-day notice of termination which the business contract required. As a result, on December 16, 1990, TU's contractual obligation to provide drivers for the Goodyear isoprene runs ended and approximately 30 of its drivers were laid off. The only drivers remaining were three who were assigned to perform an intrastate bulk rubber haul between Goodyear-Beaumont and a Kelly-Springfield tire plant in Tyler, Texas. That route was controlled by a separate leasing agreement between Goodyear and TU.

It is undisputed that TU negotiated with the Union with respect to which drivers would be retained to perform the recently begun Tyler bulk rubber run and that an agreement has been reached and has been followed.

Due to the cancellation of the TU chemical contract, the RDR dispatching operation also became severely curtailed. All its dispatchers were laid off and shortly thereafter

[2] Ryder System, Inc. is a charged party, but is named in the complaint only as the parent of RDR and Ryder Truck. It sees itself as a respondent, for there is no evidence that the Regional Director has dismissed it from the proceeding.

[3] According to Goodyear's Jim Beverly, its Beaumont transportation manager, he had been instructed by corporate headquarters to seek bids from common carriers shortly after the Texas Railroad Commission had approved the appropriate tariff. He obtained bids from three such companies: United DSI, Chemical Leaman Truck Lines, and Coastal Truck Lines.

Navarre left in January 1991. Only his assistant, Harold Flanary, remained. Sometime early in 1991 he was transferred to an RDR office in Houston, about 100 miles to the west, where he dispatched the rubber run drivers.

It is against the foregoing background that the Regional Director issued the fourth amended consolidated complaint. In general, the complaint asserts that Goodyear, TU, RDR, Ryder Truck, and, by implication, Ryder System, Inc., are joint employers. It further asserts that Goodyear's decision to terminate the TU leasing arrangement was motivated by antiunion considerations and that the discharge of the chemical drivers was unlawful as breaching Section 8(a)(3) and (1) of the Act. Similarly, it asserts that the RDR dispatchers also lost their jobs as a result of that discriminatory action and they, too, were discharged in violation of Section 8(a)(3) and (1) of the Act. Independent of the layoff, the complaint contends that one of the rubber run drivers, Lisa Hebert, was unlawfully discharged in late November because of her union activities.

It also alleges that Respondents Goodyear and TU breached the good-faith collective-bargaining obligation by not bargaining over the decision to terminate the chemical haul, by not bargaining over the effects of that shutdown, by failing to provide certain information to the Union to enable it to engage in meaningful collective bargaining and that they supposedly made some prohibited unilateral changes in working conditions. Finally, the complaint alleges certain independent 8(a)(1) violations occurred, mostly threats and interrogations. Without detailing them here, I observe that all but two of the supposed interrogations or threats were uttered by RDR personnel, either Navarre or Flanary. There is absolutely no evidence, nor any allegation thereof that any official of Goodyear committed similar acts. There are two allegations that TU's Parrish made remarks in July 1990, well after the election, giving employees the impression that their union activities were under surveillance. The evidence in support of the allegations against Parrish, as will be seen, is too weak to be credited.

Because counsel for the General Counsel called as witnesses not only rank-and-file employees but also some managers from all three companies, including Navarre, the evidence is fairly complete on all fronts,[4] even though no Respondent has yet presented evidence other than through cross-examination. I am, therefore, able to make credibility findings at this stage and I observe that much of the testimony given by rank-and-file employees on these subjects is either confused, self-contradictory, recanted, totally improbable, or credibly denied by the manager in question.

Beyond that, it should be observed that the record is utterly devoid of evidence that either TU or RDR had any input into Goodyear's decision to terminate the TU chemical haul. Furthermore, the evidence shows only that Goodyear's termination of the TU operation deprived both TU and RDR of the opportunity to continue to profit from the arrangement. Both were victims of a business decision made by Goodyear.

[4] The General Counsel called Goodyear's transportation manager; RDR's regional manager, Bill Navarre; and TU's most recent regional manager, Jerry Parrish. As yet uncalled are Goodyear corporate officials; TU's vice president, Dennis Negrey; its first regional manager, Jack Painter; and RDR's David Bienvenu and Harold Flanary, both of whom were Navarre's assistants.

Because the record is virtually devoid of evidence that either Goodyear or TU harbors animus against the Union, the General Counsel argues that the remarks made by RDR managers must be imputed to Goodyear, because in his view, all are joint employers. However, if the General Counsel has failed to prove that RDR played any role in Goodyear's decision to switch from TU to United DSI, any animus RDR may have displayed becomes meaningless. Similarly, if the General Counsel has failed to show that a joint employer relationship existed, then the 8(a)(3) cases involving the chemical driver layoff and the dispatcher layoff fail in their entirety. Indeed, the allegation against Goodyear that it unlawfully refused to provide bargaining information to the Union also falls.

In that event, only TU's discharge of Hebert, TU's supposed unilateral changes in working conditions, and RDR's 8(a)(1) conduct would remain. Indeed, RDR's 10(b) defense would come into play with respect to cer- tain allegations of the complaint which occurred, on their face, more than 6 months before the filing of the first charge against RDR, Case 16–CA–14901,[5] on February 8, 1991.

II. THE BOARD'S TEST FOR JOINT EMPLOYER STATUS

A. *Applicable Law*

Prior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, the Board's analysis of what constituted a joint employer relationship was somewhat more amorphous than it is today. After that decision, however, the Board decided to adopt the Third Circuit's rule and did so in *TLI, Inc.*, 271 NLRB 798 (1984). The test is, as I noted during the summary judgment stage of these proceedings: Where two (or more) separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for the purposes of the Act. In *Laerco Transportation*, 269 NLRB 324 (1984), the Board, referring to the *Browning-Ferris* test, defined the essential terms and conditions of employment as those involving such matters as hiring, firing, disciplining, supervision, and direction of employees.

Furthermore, the Board has held that the appropriate time frame for the analysis of whether employers are to be considered joint for purposes of the Act is that period surrounding the unfair labor practices. *Yoon Maintenance Co.*, 292 NLRB 1159 (1989), affd. sub nom. *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991); also *Clinton's Ditch Cooperative v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985). Therefore, to the extent that counsel for the General Counsel relies on incidents which occurred during the first years of the Goodyear-TU contract, they cannot be regarded

[5] At this point it is fair to observe that the General Counsel has adduced absolutely no evidence that Ryder Truck, the lessor of the vehicles, played anything but a bit role in this entire scenario. The only activity in which Ryder Truck personnel appear to have been involved is conducting driver tests to determine whether TU personnel could capably operate the equipment. These tests are required by Department of Transportation regulations. Certainly there is no evidence that Ryder Truck officials had any day-to-day dealings with the TU drivers, aside from the fact that the tractors were stored at the Ryder Truck yard when not on the road.

as particularly significant to the relationship as it existed in 1990.

In addition, the Board has now become more cautious in its acceptance of so-called control evidence either mandated by contract or mandated by Government regulation. Prior to its decision in *TLI, Inc.*, supra, the Board had been inconsistent in the manner in which it had handled such evidence. On the one hand, cases such as *Portage Transfer Co.*, 204 NLRB 787 (1973), and *Teamsters Local 814 (Santini Bros.*), 223 NLRB 752 (1976), had held that Government regulations (e.g., those of the Interstate Commerce Commission and the Department of Transportation) mandating companies to exercise control over safety checks, driver health and qualifications, applications, road tests, and maintenance or driving logs were not evidence of a joint employer relationship. On the other, in cases such as *Robbins Motor Transportation*, 225 NLRB 761 (1975); *Mitchell Bros. Truck Lines*, 249 NLRB 476 (1980); and *Redieks Interstate*, 255 NLRB 1073 (1980), the Board had utilized Government regulations which mandated such control as evidence of a joint employer relationship.

When faced with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Seafarers' Local 777 v. NLRB*, 603 F.2d 862 (1978), the Board began to reconsider the efficacy of that type of evidence. See *Air Transit*, 271 NLRB 1108 (1984), and *Don Bass Trucking Co.*, 275 NLRB 1172 (1985). Those cases applied the Local 777 rationale to find that independent contractors were not employees, for the control which their putative employer exercised was mandated by Government regulations. Based on evidence of that nature, the respondent could not be characterized as their employer.

In 1986, in *Container Transit*, 281 NLRB 1039 (1986), the Board overuled *Robbins, Mitchell Bros.*, and *Redieks* ''[T]o the extent that they may indicate the control stemming from governmental regulations is the determinative factor in the assessment of independent contractors versus employee status.'' Supra at 1039 fn. 4. Similarly, see *Precision Bulk Transport*, 279 NLRB 437 (1986).

B. *The Operational Control Clause*

Even before those Government regulation cases were overruled, however, the Board had directly faced the operational control clause of a lease arrangement which is identical to the one found here. Again, applying it to a joint employer situation, it found the clause was not evidence of actual control because it did not meaningfully affect the factors set forth in *Laerco*, supra, i.e. hiring, firing, disciplining, daily supervision, and direction. See *TLI, Inc.*, supra at 798. With those principles in mind, I turn to the evidence presented by counsel for the General Counsel.

The so-called operational control clause found in the agreement between Goodyear and TU is virtually identical to that discussed in detail in *TLI, Inc.*, supra. Indeed the General Counsel acknowledges that fact at page 52 of his brief. Compare TU Exhibit 3 with the same clause in *TLI, Inc.*, 271 NLRB 798 at 803.[6] Likewise, see the clause in *Osco Drug*, 294 NLRB 779 (1979). In both cases, the Board held that the presence of the operational control clause, in and of itself, was not evidence of joint employer status. Instead, the Board determined it was more appropriate to look to the actual handling of day-to-day business.

Thus, as a matter of law, I conclude that the operational control clause set forth in the contract between Goodyear and TU, standing by itself, is not evidence that Goodyear is a joint employer with TU of the drivers in question. The General Counsel asserts, however, that the insertion of RDR as the entity which performed the dispatching somehow changes the calculus. Rather than more closely connecting TU to Goodyear, it more likely further distances the two. If, as in *TLI, Inc.*, the factory did its own dispatching, and yet the Board found the clause not to be evidence of joint employer status, the insertion of a contractual dispatcher does not make TU and Goodyear any closer. At best, assuming a contract dispatcher is the factory's delegee, they remain the same distance apart; at worst they are further apart than the factory and the transportation company were in *TLI, Inc.* Accordingly, the General Counsel's attempt to distinguish the case is unsuccessful.

C. *Wage and Fringe Benefit Matters*

It is certainly true that an appendix to the Goodyear-TU contract sets forth the wage reimbursement schedules under which Goodyear paid TU for the cost of labor which TU provided. These figures varied from year to year as the contract was renegotiated on an annual basis. It also sets forth a margin. In generic terms, this is nothing more than a ''cost-plus'' contract, i.e., one in which the party providing services is reimbursed based on his actual cost of those services plus a prearranged profit.

The contract determines the formula by which the drivers are to be paid, i.e., a mileage rate while actually on the road plus a demurrage rate for waiting time. Furthermore, it appears that one of RDR's duties as the contract dispatcher, was to perform timekeeping services for those drivers. Thus, TU based its wage payments on information which was provided to RDR by each driver, which it confirmed and then transmitted to TU's Cleveland headquarters for payment. RDR also served as a repository for drivers' logs and other records mandated by the Department of Transportation and the Railroad Commission.

The contract does not clearly require TU to provide the drivers with fringe benefits. In 1985, when the drivers were first hired, they had been told that they would shortly be converted to RDR employees and would be given Ryder uniforms and be provided with Ryder fringe benefits. Even so, TU took steps before they began to work to cover these drivers with health insurance[7] through an insurance provider with whom it normally dealt, Diversified Services, Inc. Beginning in late 1985 all of the drivers became eligible for TU-provided health insurance.

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[6] In pertinent part the clause reads:

> [The factory] at all times will solely and exclusively be responsible for maintaining operational control, direction and supervision of said drivers, such control, direction, and supervision, including, but not being limited to, scheduling and dispatching the drivers, routing instructions, loading and unloading procedures and all others relating to the day-to-day private carriage operation of [the factory].

[7] As an exemplar, see driver Christopher Morgan's August 23, 1985 application for group health insurance. TU Exh. 45. It is a TU form, not an insurance company form.

It seems unlikely that there was any confusion about who provided the insurance. One driver made a claim under that policy for his spouse's illness. Although the plan provided for family coverage, it did not instantly cover preexisting health conditions. When the insurance company denied the claim because it was a preexisting condition, the driver sought the assistance of TU's Negrey to try to persuade the insurance company to reimburse the medical bill. The driver acknowledged that Negrey had attempted to do so but had failed. He did not seek assistance from Goodyear or RDR, no doubt because he knew they were not involved.

In 1989, after some carping by some of the drivers, TU created for each of them a retirement savings account known as an ''individual retirement account'' or IRA. It made payments directly into those accounts created for each driver.[8] From the documentation, it appears that the IRA payment, like the health insurance premiums, were paid by TU from the gross profit portion of its receipts from Goodyear.

Driver Charles Zerengue testified that once in 1990, he experienced a problem receiving holiday pay. Although he complained regularly to RDR officials such as Navarre,[9] the problem was not resolved until he went to the TU official in charge of the operation at the time, Parrish, who referred him to Negrey. Negrey eventually approved it.

Although it does appear that the contract sets forth the wage reimbursement, and one might argue, as the General Counsel does, that this constitutes the ''codetermination'' of a wage, I do not believe that that characterization is what the Board or the courts had in mind when using the phrase ''share and codetermine'' essential terms such as wages. A contractual agreement, between two companies, utilizing cost-plus concepts, is not the type of arrangement which either *Browning-Ferris* or *TLI, Inc.* was discussing. If they were, all cost-plus agreements would become joint employer relationships. Neither the courts nor the Board has ever expressed such an intention. Indeed, cost-plus contracts are common. Such an interpretation would significantly disrupt thousands of such agreements. Moreover, it is quite clear that TU had sole control over at least two aspects of the employees' remuneration, health insurance, and retirement.

I conclude, therefore, that the factor of wages and fringe benefits does not provide the General Counsel with persuasive evidence of a joint employer relationship.

D. *Hiring—August 1985*

Counsel for the General Counsel called eight drivers who testified about the manner in which they were hired in August 1985. Some testified conclusionarily that they had been hired by Ryder and/or Goodyear, ignoring TU altogether. At least one driver tried to claim, without foundation, that a Goodyear vice president was present during the process. Others were aware of and recognized that their hiring by TU was a temporary arrangement while ''Ryder'' obtained intrastate hauling authority. Drivers Read, Cain, Zerengue, Rains, and Brown all gave testimony which demonstrates that they knew they were being hired by TU as an interim arrangement pending their being transferred to Ryder. Still others acknowledged that TU was their direct employer. For example, Read, Fontenot, Cain, Zerengue, Rains, and Brown all testified that they knew TU was their employer.

The last cited testimony does not seem particularly remarkable considering the fact that each of them filled out TU job application forms and TU paid for their physical examinations. This does not mean that RDR and/or Ryder Truck were not involved in the hiring process. Clearly they were. Many of the applicants were interviewed by Navarre or another RDR official. However, driver Hoke testified Navarre did not do the actual hiring, TU did. Only one driver, Morgan, claims that Goodyear was involved at all. He said a Goodyear vice president from Akron, Ohio, was present. He was unable accurately to give that individual's name; he did not know the person and could give no positive identification. Frankly, his evidence has no foundation whatsoever. In view of the fact that Morgan stands alone and the fact that the General Counsel was unable to lay a foundation regarding the nature of his knowledge, Morgan's testimony must be discounted altogether.

Furthermore, none of the drivers knew exactly how their applications were processed after they turned them in. It appears that at least one TU official, Negrey, was on the scene at the time of the hiring. It also seems likely that it was not particularly difficult for Negrey or any person familiar with the requirements which this type of driver must meet, to decide which applicants should be hired.

After a preliminary determination was made to hire each of these individuals, they were all sent to the Ryder Truck yard where they were given a driver's test by a Ryder Truck safety official to determine whether they met the Department of Transportation competence requirements. Aside from that involvement, Ryder Truck seems to have had no other role in the hiring process.

Although one could speculate regarding what might have happened had a particular driver failed the driver's test, there is no evidence that occurred. Even had a driver failed such a test, it seems likely that the failure would be based on standards set not by Goodyear, TU, or Ryder Truck, but by the Department of Transportation. Thus, if an applicant failed to meet those standards, it would not be due to any independent decision made by Ryder Truck.

Moreover, the General Counsel has not shown what weight the interviews were given in the decision-making process with respect to who actually was chosen. Specifically, all the witnesses testified they were interviewed by a person whom they thought to be either a Ryder individual (and of course they could not distinguish between any of the Ryder entities) or a TU person. The one thing about which they were fairly certain was that no Goodyear representative interviewed them. Nonetheless, the General Counsel has not shown what role the interviews themselves played in the hiring process. Principally, he has not shown that the Ryder interviewers did anything other than to perform a personnel assistant's clerical role, to take information and determine that the applications had been filled out properly.

Although one might conclude that it was Ryder who had the sole input on the decision, that is only speculation. Even so, because it is a given that the individuals being hired were believed destined to become Ryder employees when the fore-

[8] The General Counsel sought to demonstrate, through the testimony of driver-witnesses, that they believed the IRA payments were made by Goodyear. However, as these witnesses had no competency to know, the testimony was not received.

[9] Navarre had refused, saying it would be paid only if TU okayed it.

seen TU involvement ended, it would be no surprise if RDR had some involvement in the process. Certainly, the drivers were going to be driving Ryder Truck leased vehicles at the very least. On the other hand, one cannot successfully assert that TU had no role. The applicants were completing TU paperwork, not Ryder's. Without proof to the contrary, one must presume the decision-making authority rested with TU, which had Negrey on the scene overseeing the entire process.

In the post-1985 hires, RDR's role in hiring diminished.

E. *Hiring After 1985*

The General Counsel called five drivers as witnesses who were hired after it became clear that RDR was not going to get authority from the State of Texas to operate intrastate. These were Ozio, who was hired in March 1986; Lincoln who was hired in 1987; and Coney, Sonnier, and Hebert all of whom were hired in 1990.

On direct, Ozio testified he was hired by Navarre to go to work for Ryder in about March 1986. However, on cross-examination he acknowledged that he knew he was going to work for TU because he had learned from his brother-in-law, also a TU driver, that TU was hiring drivers for the chemical runs. Navarre, who interviewed Ozio, recommended that TU not hire him. Negrey hired him anyway.

On direct, Lincoln testified that he thought he was being hired by Ryder, but admits within a week he was aware that his actual employer was TU. He subsequently advised others that his employer was TU and has never suggested it was RDR. The other entities whom he told his employer was TU include the unemployment insurance office and other employers with whom he sought employment. He worked for TU for over 2 years and was well aware that his employer was TU, not RDR.

Coney testified that he was hired to work for RDR by Navarre, his interviewer. However, he quickly agreed that he had no knowledge regarding TU's decision-making procedures.

Sonnier testified that Navarre hired him to work for Ryder, but he also said on cross-examination that he knew from a friend, who had told him to apply for the job, that TU was the employer. Below it will be seen he was actually employed by both entities.

Lisa Hebert was hired as a chemical driver on February 15, 1990. She said she was interviewed by Navarre who told her to go to work the next day. She also acknowledges that on the day she reported for work she knew she was working for TU, not Ryder. She said Navarre laid her off in April, but TU's Negrey recalled her in June.

All five of these individuals filled out TU job application forms,[10] took physicals paid for by TU, and were carried on the TU payroll as being covered by the TU health insurance and the TU IRA plan (if they had been employed long enough to meet the IRA eligibility rules).

[10] Hebert testified that she did not actually fill out her TU application form and related documents until 3 months after she had gone to work. She claims somebody backdated the documents which were received in evidence. Nonetheless, all those documents are TU documents.

F. *The Termination of Employees*

There is not really a great deal of evidence with respect to employee termination except for the December 16, 1990 layoff of the chemical drivers. That of course was mechanically accomplished by TU. The letters of termination are all signed by TU officials and there is no suggestion that Goodyear or RDR officials were in any way involved in the mechanics.

Except for that instance, the only other discharge is that of Hebert on November 29, a few days after Goodyear had officially notified TU that its contract was being canceled. Her discharge is alleged to be a violation of Section 8(a)(3) and (1) of the Act. It will be discussed in greater detail below. Nonetheless, it is significant to note that she was discharged immediately after admitting falsifying her Department of Transportation driver's log. The falsification came to the attention of RDR dispatcher Tammy Mancil. Mancil reported the falsification to TU Regional Manager Jerry Parrish who investigated the circumstances and made the decision to discharge her. All the termination documentation came from him. There is no suggestion that Goodyear had anything whatsoever to do with it. RDR's only involvement seems to have been dispatcher Mancil's report to Parrish. Mancil herself is also alleged to be a victim of Section 8(a)(3) of the Act and is clearly a statutory employee employed by RDR, not TU or Goodyear.

Thus, there is no evidence that RDR management played any significant role in triggering Parrish's investigation. Parrish obtained, by telefax, copies of Hebert's log from Mancil. Furthermore, it is accurate to say that Parrish later made a mild joke to Navarre about his decision to discharge her. Nonetheless, there is no evidence whatsoever that RDR played any role in the discharge except to report a transgression of the Department of Transportation hours and logging rules.[11]

The General Counsel also seeks to have me consider, posthearing, a letter dealing with Goodyear's role in the termination of a TU driver named Bobbie Yates. The letter, dated November 16, 1989, is signed by TU's then regional manager, Painter. First, the letter is in the record only as part of the formal file (G.C. Exh. 1(xxx), Tab C., p. 6). It was offered in support of an argument made in a pretrial summary judgment motion (although it is not clear why it was included since the remainder of that subexhibit deals with Ryder's attempts to obtain intrastate hauling authority). The letter was not referred to or offered at all during the hearing. Accordingly, although it may technically be a part of the record, it is not evidence.[12] There is no showing why the

[11] Mancil did testify that she overheard half of a telephone conversation between Navarre and Parrish and that Navarre insisted that Hebert be terminated despite Parrish's supposed preference to only suspend her. She claims Navarre insisted on the termination and that therefore Navarre in fact terminated Hebert. Her testimony cannot be credited on the point. She only heard half the conversation and has no direct knowledge of what Parrish wanted to do. If Parrish and Navarre were discussing Hebert's circumstances, she had no way of knowing what Parrish had to say. Moreover, Navarre denies that version.

[12] The Ryder respondents have moved that portion of the General Counsel's brief referring to Yates be stricken as being outside the record. Although not evidence, I observe that its physical location

Continued

General Counsel failed to adduce it or otherwise deal with it during the course of the hearing. Had counsel for the General Counsel wished to rely on such a letter for the purpose of proving his case, no doubt he would have offered it during his case-in-chief. Therefore, I hesitate to consider the letter because no respondent has had the opportunity to deal with it. The fact that it was offered for the limited purpose of supporting a prehearing motion does not make it evidence for the purpose of this motion, necessarily based on the record as actually made.

Nonetheless, the matter remains somewhat ambiguous. It would appear from the face of the letter that the individual in question had had an accident while driving a chemical truck, probably carrying isoprene. Isoprene is at least a hazardous, if not ultrahazardous, material. See the Department of Transportation regulation, 49 C.F.R. § 172.101 which classifies it as a ''flammable liquid.''

Given the fact that the State of Texas up to that time had not permitted Goodyear to cause that material to be transported by common carrier due to the hazardous nature of the cargo, it is clear that Goodyear, as a private carrier, had an obligation under state law to rid itself of drivers whose behavior and record risked the safety of the public. Texas tort law holds that liability for an accident with that material is nondelegable (see *Greyhound Van Lines v. Bellamy*, 502 S.W. 2d 586 (Tex. Civ. App. 1973)); indeed, nondelegability is imposed as a condition of holding the private carriage permit to operate on Texas highways. Therefore, if Goodyear asked for the discharge of an individual such as Yates because of her dangerous driving, it would not be because it was attempting to control the day-to-day conduct of the driver, but to eliminate what it reasonably deemed an unacceptable hazard which under state law it was liable.

Because liability, at least until late 1990, could not be shifted to a third party, Goodyear's apprehension over its potential liability is appropriate. It is consistent with the operational control clause of the lease agreement. That is, because the operational control clause is designed to force contractual compliance with the Texas law on liability, the exercise of rights under that clause is simple compliance with Texas law on matters of liability, nothing more. Therefore, it cannot be used as controlling evidence that a joint employer relationship existed.

Accordingly, even if I were to receive the document regarding Yates, it would not constitute evidence of anything other than exercise of the operational control clause, something which the Board has already held not to be of significant weight in determining joint employer status under the Act. It certainly does not demonstrate day-to-day control over this particular driver. As previously noted, this document is not in evidence and there has been no testimony about it. Therefore, my observations here are to some extent without the benefit of argument; nonetheless, I decline to consider it. To that extent, the motion to strike is granted.

is most obscure. It is found as the sixth page in the third (of 15) lengthy exhibits to Goodyear's prehearing Motion for Summary Judgment. Thus, although served on all parties at that stage, it was not part of the hearing. Indeed, because the Board's traditional practice is to provide only an index to the formal documents to non-Board parties at the outset of the hearing, those parties must engage in collating those documents separately for their use. Normally that is unnecessary because only the operative documents, the complaint and the answer, are of significance. In this instance, however, there are 104 formal exhibits (many with attachments) and RDR is well within its rights to complain that the Yates letter is outside its view. It is not in evidence and is buried in uncollated and inoperative paperwork.

G. *Discipline, Including Warnings, Reprimands, and Suspensions*

The General Counsel's strongest witness with respect to supposed disciplinary proceedings levied against a TU chemical driver by either RDR or Goodyear is Alvin Ozio. Ozio says he was hired in March 1986 although his job application with TU shows it to have been on May 21, 1986. Ozio described five incidents which the General Counsel asserts constitute discipline by companies other than TU.

The first incident occurred sometime shortly after Ozio's hire. He says Navarre gave him a reprimand for speeding within the confines of the Goodyear chemical plant. He claims Navarre had observed him exceeding the plant's speed limit and told him, ''I am giving you a warning, a verbal warning.'' Nothing further was ever said about the incident and there is no record of it. Navarre has no recollection of the incident at all. At best this incident can only be seen as a routine admonishment that safety rules be adhered to within the plant. It is obvious that a chemical plant of this type requires everyone to be constantly aware of and avoid safety hazards.

The second incident appears to have occurred sometime in early 1987. Ozio says he attended a safety meeting at the Ramada Inn in Beaumont; the meeting was conducted only by Navarre and no TU or Goodyear personnel were present. The drivers who attended were the 12 drivers from the so–ca–lled ''A Team.''[13] After some general business and safety matters, Ozio says Navarre began ''passing out written statements for reprimand.'' When he got to Ozio, Navarre supposedly put a statement in front of him saying that he had been seen speeding over the San Jacinto River Bridge in excess of 60 miles an hour on a specific date. Simultaneously, he testified Navarre told him he was getting ''three days off.'' Ozio argued the point asserting that he had not been at the location on the date in question and challenged Navarre's proof. He says Navarre told him to shut up unless he wanted a week off. Accordingly the discussion ended.

Aside from Ozio's testimony, there is no evidence that any of this occurred. Ozio said he did not save the written warning. Moreover, the General Counsel has offered no supporting proof that Ozio actually was suspended for 3 days. The missing documentation is very curious. It allegedly shows that Navarre, an RDR supervisor, directly disciplined a TU employee. Ozio's explanation that he discarded the document seems most unlikely. However, if he did so, the General Counsel would have been aware that an essential document was missing and would have made an effort to show that Ozio actually lost 3 days' work by demanding production of the appropriate records, either personnel or payroll. He did not do so.

The next incident which Ozio described seems to have occurred in 1989, but his recollection is vague. He could only say that he thinks it occurred during the third year of his em-

[13] TU's drivers were divided into an ''A Team'' and a ''B Team'' for scheduling purposes.

ployment. While driving through another chemical plant, Ozio had a minor accident in which he blew a trailer tire and dented a fender. He reported it to a dispatcher at Goodyear who told him to get the tire repaired and return to the office. After doing so he says Navarre called him to the office and asked about the incident. When Ozio described it to him, he says Navarre told him he was suspended for a week without pay. He first testified that he was suspended for 7 days but on cross-examination he says he was taken out of service for only 3 days.

The fourth incident occurred on the highway near a Shell Chemical plant at Deer Park, Texas. Ozio thinks it occurred sometime during the first part of 1989. A member of the public claimed Ozio had run him off the road and called the Goodyear plant to complain. When Ozio arrived at the plant and parked his truck he went to the dispatch office. He was asked by dispatcher Mary Ellen Melonson if he had had an incident with a car. Ozio says she was on the telephone at the time with Navarre. When she advised the person on the telephone that Ozio had acknowledged having had an incident, she told Ozio, ''Bill told me to get you to the other side of the gate until further notice.''

Believing he was being terminated, he declined to follow that direction saying he was going to see Jim Beverly, Goodyear's director of transportation. He says Mary Ellen relayed that message to ''Bill'' on the other end of the phone. Then he said Mary Ellen told him ''No, the old man is going to tear [you] up, tell him not to go down there.'' Ozio would not accept that caution and went to see Beverly anyway. He says he explained to Beverly what had happened and that it had occurred on his second load of the day. He says Beverly told him to get back on the road and pull his third load. He did so. Ozio says nothing further was ever said about the entire incident, not the accident itself or his supposed disobedience of Navarre's direct order not to go to Beverly.

Navarre did not recall either the accident incident or the incident in which the dispatcher told Ozio to get outside the gate.[14]

The last incident about which Ozio testified was a written reprimand he supposedly got from an RDR safety man, John Vadis, sometime during mid-1990. He says it concerned his having followed a flatbed truck too closely. Ozio says Vadis told him that the reprimand was to be put into his permanent file, and gave it to David (Bienvenu). Although Ozio was given a copy of the reprimand he did not produce it. He says Bienvenu later removed it from his file.

Frankly, it is unclear into which file Vadis would have placed such a document. Permanent employee files are maintained by TU in Cleveland. RDR maintained only licenses, certifications, inspection reports, time records, and logs at the Goodyear dispatch office. Furthermore, Navarre credibly testified that Vadis, as a safety man, had no authority to discipline TU drivers; indeed, it is not clear that as a safety man he was a supervisor or had the authority to discipline even RDR employees.

On the whole, I find myself in agreement with all three Respondents that Ozio's testimony is either exaggerated or deliberately incomplete. Certainly the absence of supporting documentation, even though it supposedly existed, does not assist the General Counsel here. Furthermore, both probability and demeanor favor disbelieving Ozio on critical points. Finally, as will be seen, Ozio seems starkly alone in his description of these matters. Thus, even if he were credited, given the fact that they occurred over a 4-1/2 year period, they are so infrequent and have occurred under such ambiguous circumstances as to be accorded little significance.

The next individual whom the General Counsel contends was suspended by RDR is Robert Brown. Brown had been hired in 1985 as an isoprene driver. He quit in July 1989. He testified that he was suspended on two occasions, the first in January 1987 and the second sometime in June 1989.

On the first occasion he said RDR's Navarre telephoned him and told him not to come to work because he had been suspended for improper and unsafe driving, i.e., tailgating, blowing his horn, and blowing kisses. Brown denied the misconduct. He says Navarre told him that ''Goodyear'' was upset and wanted him fired. He says Navarre told him he had talked ''them'' into giving him a week off instead. Brown also says Navarre told him he knew some of the conduct, i.e., blowing kisses, was totally out of Brown's character. However, by letter dated January 8, TU's Negrey suspended Brown for 3 days. The letter states, ''We have been advised by our customer The Goodyear Tire & Rubber Company that a young lady reported that the truck you were assigned to drive on January 1, 1987 was reportedly tailgating her car . . . . She further reported to the Goodyear management people that the driver (which was positively identified as you) was making hand gestures and blowing the air horn.'' Brown wrote Negrey back on January 29 denying the incident in its entirety and complaining that Negrey had taken the word of a stranger over ''your own employee.''

The second suspension in June 1989 was directly handled by TU's Jack Painter. This followed an argument which had occurred a few days previously between Brown and RDR's Bienvenu. Brown had accused Bienvenu of improperly rotating loads among the TU drivers. Brown believed he had a low load count and was entitled to some additional runs. Moreover, he believed Bienvenu was showing favoritism to a boyfriend of one of the dispatchers. He went down to a local hotel where Bienvenu was having a meeting.[15] Brown admits calling Bienvenu ''a few wild words'' and agrees he would not deny having been abusive to Bienvenu.

On June 15, 1989, TU's Painter wrote Brown a letter saying, ''We have been advised by our customer, Goodyear Tire and Rubber Company, that you were involved in a serious incident on June 9, 1989. You used abusive and threatening

[14] I do not rely, at this time, on TU Exhs. 7 and 8 which are not yet in evidence. They assertedly show two 1988 reprimands issued to Ozio by TU's Painter regarding both incidents. Ozio would not acknowledge having received them and at this stage of the case they have not yet been authenticated and have therefore not been offered. Nonetheless, Ozio's refusal to acknowledge the two letters seemed insincere. They bore his address (except for an incorrect zip code) and his contentiousness on the point seemed artificial. He did acknowledge receiving TU Exh. 9, also mailed to his address with the incorrect zip code, in which TU's Parrish discussed a workman's compensation and health insurance claim which Ozio had made under the TU health plan.

[15] The meeting involved the layoff of drivers from an operation known as ''Wall Street.'' The record does not show exactly who the Wall Street drivers were, but it is apparent that they were being dispatched regularly by RDR from Beaumont. I infer that they were directly employed by RDR.

language to your supervisor. Confrontation is not the best way to resolve problems, especially in public places.'' Painter went on to suspend Brown for 3 workdays and warned him that additional incidents of that nature could result in further disciplinary action ''up to and including discharge.''

Neither of these incidents demonstrates that Goodyear or RDR had any decisional input into the discipline which TU meted out. It is apparent in both cases that the actual decision was made by a TU official, although in the first, communication of the decision came from the RDR dispatching office.

In the first incident, there is absolutely no evidence that Goodyear decided anything. It is true that the member of the public complained directly to Goodyear about the incident on the highway.[16] However, at best all Goodyear did was to report the incident either to TU or to RDR. It is not clear where the Goodyear report initially went. Furthermore, although Brown asserts that he had heard Goodyear's Beverly was the individual who was angry with him, he does not actually know that. Brown never discussed it with Beverly. His information is based on hearsay from other drivers. Brown does describe a conversation with Navarre which is at best unclear with respect to who was deciding what. He says Navarre told him he was being suspended for a week, rather than being discharged as ''Goodyear'' had requested. He claims that Navarre told him that he, Navarre, had decided to reduce the discharge to a week's suspension. However, the TU documentation, signed by Negrey, differs significantly. Negrey's letter suspended Brown for only 3 days, not a week.

When Brown chose to complain about the discipline, believing it to have been based on misinformation, he went straight to TU's Negrey, saying nothing about what Navarre had supposedly said and nothing about Goodyear. It is apparent that he well knew the decision had been made by Negrey, not by anybody else. Furthermore, he was seeking redress from Negrey.

In the second incident, it is obvious that the decision was made by TU's Painter and not by Bienvenu or Navarre. Moreover, in reviewing Painter's letter it is obvious that Bienvenu was most upset over the confrontation, and believed himself to have been in physical danger.[17] Taking Painter's letter at its word, it appears that Bienvenu initially reported the confrontation to someone at Goodyear who in turn relayed it to TU. It is evidence only that Goodyear relayed Bienvenu's complaint to Painter who acted on it. There is no evidence that Goodyear actually made a decision. It is true that Painter's letter refers to Bienvenu as Brown's ''supervisor,'' but in the overview that reference seems to be insignificant. If Bienvenu had truly been Brown's supervisor he would have taken action himself or through Navarre and not bothered to have reported the matter to someone else.

In conclusion, there is no evidence that Goodyear or RDR played any decisional role in suspending Brown on either occasion. It is true that they reported facts to TU's management, but the documentation clearly shows that the decisions were made by TU management officials.

The next driver to whom the General Counsel points is Charles Zerengue. Zerengue suffered two suspensions. The first occurred in early 1987 after he made a serious error by failing to check his documentation against the product which was loaded onto his tank trailer. He had been sent to a vendor to pick up a load of a product known as ''Stream 11'' but failed to notice that the vendor had loaded isoprene instead. At some point, not clear in the record, the isoprene became mixed with Stream 11. Whether that occurred in the tank of the truck or at a storage tank at the Beaumont facility is unclear to me. Nonetheless, the error was regarded as significant. Zerengue downplays his responsibility in the matter saying he wasn't the one who loaded the truck. However, it is undisputed that it is the driver's responsibility to check the paperwork which the dispatcher gives him and to make certain that the proper product is loaded in accordance with the order.

After he returned home, he received a telephone call from RDR's Bienvenu. Zerengue says Bienvenu told him that Goodyear's Beverly had suspended Zerengue ''until further notice.'' Bienvenu told him that the contaminated load had cost Goodyear ''a bunch of money to clean up.''

As soon as Bienvenu hung up, Zerengue called TU's Negrey in Cleveland. He had to wait a while for Negrey to return the call. When he did, Zerengue says he asked Negrey what the heck was going on; he says Negrey asked him to tell him what had happened. Zerengue then described in factual detail how the load had become contaminated, explaining to Negrey that he believed it was the vendor's error, not his. He told Negrey that he hadn't been home more than 45 minutes when Bienvenu called him to tell him that Beverly had put him on suspension until further notice. Zerengue said Negrey told him he would look into it and call him back.

He says that several days later, after calling Bienvenu to find out what was happening, Negrey called him. Negrey told Zerengue that he had some good news and some bad news. Zerengue says Negrey said, ''The good news is, Mr. Beverly said that you got your job back.'' The bad news is, ''He give you [sic] a two week suspension.'' The two then went through the entire incident in detail with Zerengue continuing to assert that he hadn't been fairly treated. Negrey suggested that he just forget about it and go on. Eventually Zerengue did exactly that.

By letter dated June 10, 1987, Negrey put the suspension in writing. His letter states:

> We have been advised by our customer, The Goodyear Tire & Rubber Company, that you were involved in a serious incident on May 30, 1987, whereby you were scheduled to pick up a product ''Stream 11.'' Instead you picked up ''Isopreme'' [sic] and consequently the product was contaminated and ruined at a substantial loss. We have gone over the procedures about reviewing paperwork and have no other alternative at this point but to suspend you for six working days. The suspension will commence at the discretion of dispatch upon receipt of the copy of this letter.

A copy of that letter was sent to RDR's Navarre.[18]

[16] All the trucks driven by TU drivers were marked with the Goodyear logo, including the legally required references to Goodyear as the holder of the permit.

[17] Brown is a 6-foot 2-inch man and weighs over 220 pounds. Bienvenu is of much smaller stature.

[18] It should be noted here that although Zerengue gave two affidavits to the Board agent who investigated the case, he never described the incident prior to the hearing.

The second suspension occurred during the spring of 1989. He had had a minor accident in the Goodyear yard and had filed an accident report. The next day when he reported for work, an RDR dispatcher relayed the message that he was to call Jack Painter. When he did so, Painter told him he was being suspended for 3 days because of the accident.

The General Counsel argues that the decision must have been at the behest of RDR because Painter had not discussed the accident with Zerengue before suspending him. The General Counsel clearly overstates the circumstances because Painter undoubtedly knew what Zerengue's factual description was through Zerengue's own accident report. It is reasonable to assume that after Zerengue filed the report with the dispatch office it was communicated to Painter.

Later, in July 1990 Zerengue was seen by a dispatcher going through papers on Navarre's desk. The matter was reported to Parrish who on July 6 had a telephone conversation with Zerengue in which he asked Zerengue's version of the facts. On July 19, Parrish wrote Zerengue a letter saying ''We have been advised by our customer, Goodyear Tire and Rubber Company, that you were involved in an incident on the evening shift of July 4, 1990. You reportedly came into work snidely and bitterly complaining about the previous week's payroll. The dispatcher on duty was unable to answer your questions regarding same, and you were told to ask Bill [Navarre] about it the following day. At this time you began looking in several file cabinet drawers, and on Meri's desk you were looking at the payroll printout.'' The letter concluded by admonishing him, in somewhat vague terms, that such conduct was unprofessional and that he was to avoid it in the future. It ended with the statement that the letter was to be considered a ''verbal warning.''

It it quite apparent that the discipline described in the last two incidents was meted out solely by a TU official, first Painter then Parrish. There is no realistic hint that the decision-making process included RDR or Goodyear. The 1987 incident is somewhat suspect for a number of reasons, including Zerengue's credibility in other areas of his testimony. With respect to his description of the incident itself, the reference to Beverly's involvement is entirely second hand. It occurred almost 4 years before Zerengue made any effort to describe it. In addition it is clear that Zerengue was exercised about what he regarded as the unfairness of it all and he strongly believed, accordingly to his version, that Beverly had made the decision. He complained mildly to Negrey about its unfairness, yet he never spoke to Beverly about the unjustness of it all.

In addition, Zerengue gave some factually disbelievable testimony with respect to his perception about who employed him. For example, he claimed it took him about a year after his hire before he realized he was a TU driver rather than a Goodyear or Ryder driver. He attempted to persuade me that he had never received a copy of the TU drivers' rules, implying that the rules needed to be given to him personally before he would acknowledge their existence. In fact, they had been posted at the dispatch office in November 1985. Furthermore, he actually acknowledged receiving his own personal copy by his signature dated December 17, 1986. He weakly covered by saying he didn't recall signing for it. In addition, he said that he thought the rules were RDR's, not TU's. The evidence shows however that they are headed with the TU logo; other evidence shows they were actually drafted by Negrey.

My impression of Zerengue is that his testimony is not to be trusted. He has clearly come to understand that for the complaint to succeed all three Respondents must be shown to have control over his circumstances. In this regard it is very easy for him to have fabricated Beverly's supposed involvement in a 1987 incident. Because of its age, no one's contrary recollection would be any better than his, and his would stand a reasonably good chance of being credited. Unfortunately, his failure to confront Beverly over the matter, together with more clear facts as found in the subsequent incidents, and his own lack of credibility undermine acceptance of his recollection of the 1987 incident. Thus, to the extent that the complaint relies on Zerengue, it fails.[19]

The General Counsel also relies on the testimony of driver Christopher Morgan. The first is more of an anecdote rather than a reprimand but it illustrates the kind of authority which Beverly exercised over the Goodyear transportation operation. Sometime in 1988 Morgan was about to leave the plant with a load. His truck was parked on the scale and was being checked by security. At that point Beverly came to him and asked if he was driving that particular truck. When Morgan replied that he was, Beverly told him ''Well, you tell Bill Navarre that I am not paying for them [RDR] to run Bridgestone tires on that darn truck, and you don't bring that truck back to the plant without getting those tires changed.'' Obviously, Beverly did not want a Goodyear Tire and Rubber truck to be seen running on tires manufactured by a competitor.

Morgan said he regards the incident as a reprimand; clearly it was not. It does show that Beverly maintained an oversight over the trucking operation. This is consistent with both his job and with the equipment lease between Goodyear and Ryder Truck.

The second incident occurred about a year later, sometime in 1989. This time it was at the Ryder Truck yard, approximately 2 miles from the plant. Beverly came to Morgan saying he had received a telephone report that one of the tank trucks had run a stop sign. Beverly apparently believed Morgan had been the driver. In fact it had been another driver, Buddy Surrette, whose truck was also parked in the yard. In any event, Beverly told Morgan that he would ''not tolerate these trucks being operated in that fashion; that people had called and said that the driver had not even tried to slow down for that stop sign, and . . . Goodyear would not stand for it and he wouldn't stand for it and the name of Goodyear

[19] Zerengue also described two verbal reprimands. He said the first was given him in February 1989 by RDR's Bienvenu for supposedly failing to perform a posttrip inspection. Assuming that occurred, it is quite clear that Bienvenu would have been enforcing a TU work rule. See Rule 1.5(5). In the incident, Zerengue's failure to perform that inspection resulted in an unroadworthy truck being assigned to perform a run. Fortunately, the subsequent driver noticed the defect. The second incident involved both TU's Painter and RDR's Navarre sometime in April 1990. Both summoned Zerengue into a private room where, Zerengue says, Navarre reprimanded him for failing to timely complete his runs. The fact that Navarre did the speaking is of little significance, for undoubtedly Navarre was speaking with Painter's approval. In any event, it is not clear that either of these incidents constituted discipline. The first may have, the second probably did not. Neither was reduced to writing and both can be seen as reminders rather than discipline.

would not be abused by reckless driving in that fashion.'' Eventually Beverly was directed to the driver who had actually run the stop sign.

There is no evidence that either Morgan or Surrette received any actual discipline for the incident. Certainly the comments would not qualify as discipline under the TU work rules. At best it was the admonishment of a concerned customer that dangerous conduct not occur while operating the trucks loaded with hazardous material. Again, this falls within the operational control authority of the contract as well as attempting to reduce the risk of liability under state law.

Similarly, Beverly twice told driver Lisa Hebert to wear safety glasses while on Goodyear's loading docks. The safety glasses rule was uniformly enforced throughout the plant and applied to everyone no matter who employed them. It is true that on the second occasion Beverly told Hebert that there would be ''no third time.'' The General Counsel argues that his assertion is evidence that he would discharge her; actually, the statement is ambiguous. It could easily mean that Beverly would not allow her on the premises without safety glasses, the standard response for breaching the rule. Hebert complied and obtained safety glasses. There is no written record of either incident and it is not clear that they constituted discipline. It seems more likely that it was simply a dressing down to get her to follow the safety rules.

Driver Jonathan Rains said sometime in 1987 Navarre gave him a so-called speeding ticket for speeding on the interstate highway.[20] These tickets are nothing more than reminders that drivers are to follow safe practices while on the highways. They certainly are not discipline in any real sense of the word; they are simply attention getting devices. They are no different than an oral reminder that safe practices are to be followed while driving these vehicles on the highway. Despite Rains' assertion as discussed in the previous footnote, there is no evidence regarding the extent to which this device was used. It seems to have been used principally at safety meetings. Safety meetings, of course, normally have no disciplinary features. They are conducted for the purpose of reminding employees to perform their jobs in a safe manner and to alert them to risks which may be arising and which can be avoided. They are often conducted by nonsupervisors. Indeed, RDR had safety men on its staff, including John Vadis, who has not been shown to have been a supervisor. Even when that function is performed by a supervisor, assuming Navarre or one of his assistants such as Bienvenu or Flanary did it, it was in the context of education, not discipline.

On July 7, 1987, Negrey issued a written warning to chemical driver John Read, if not others as well. The warning stated, ''We have been advised by our customer, Goodyear Tire & Rubber Company that on July 1, 1987 you were delayed along with several other Transportation Unlimited drivers at your delivery at Shell Oil for 4–5 hours. Not one of the drivers, including yourself called in to dispatch to advise them of the delay. This is contrary to policy as prescribed in the work rules. You are to call when delayed beyond normal delivery time. Please consider this letter a written warning, as future incidents of this nature could result in further disciplinary action.''

It can be seen from these incidents that TU was in control of its drivers by 1987, if not much earlier. It was overseeing and disciplining its drivers in the manner which it thought appropriate. Moreover, there is no evidence that RDR or Goodyear was doing anything other than informing TU management of various occurrences. Certainly there is no significant evidence that either RDR or Goodyear was participating in the decision-making process.

H. *The Transfer and Interchange of Employees*

Counsel for the General Counsel asserts that the employer for whom the drivers worked became blurred in certain circumstances. For example, he points to a practice whereby on occasion a TU driver served as a relief dispatcher. In addition he maintains that sometime in 1990, after the creation of the so-called rubber runs, some employees switched employers.

With respect to the first, Navarre reports that over the 5-year period of time of the RDR-Goodyear dispatching contract, RDR normally employed approximately four dispatchers in addition to its managers. He says that occasionally, due to the work schedules of the dispatchers, it was necessary to find someone to fill in. The most junior chemical driver was George Vickery Jr.; he was asked on an infrequent basis to perform that task. Called by the General Counsel, Navarre's memory was not clear on the point, yet he agreed that Vickery may have served as a relief dispatcher for as much as 3 months sometime during 1989. Even so, the record is unclear regarding what that meant. Did it mean that Vickery was available to fill in for a 3-month period; did he do it a few times per week for that period, or did he serve full time for those months? Because he was ''relief,'' his duties during that time span are most unclear. It is the General Counsel's responsibility, when proving an issue, to do more than create an ambiguity in order to prevail; equivocal hearing records are insufficient to qualify as proof of a salient fact. More is required.

In addition, driver John Read testified that he occasionally served as a relief dispatcher. Both Navarre and Read agree that when serving as dispatchers the drivers' paychecks continued to come from TU. Read says that the rate of pay was the same as the demurrage pay he received as a driver, i.e., the hourly pay drivers received while waiting.[21]

In March 1990, the Goodyear plant began shipping bulk rubber to a factory in Lawton, Oklahoma. As this was an interstate run, and as RDR had authority to run interstate, it contracted with Goodyear to provide leased drivers for that run. The individuals who drove that route are not a part of this case. A short time later, apparently in April, a second bulk rubber run was added. This route was between Beaumont and the Kelly-Springfield tire plant in Tyler, Texas, an intrastate run. Goodyear and TU agreed that TU would provide leased drivers for that run. Neither bulk rubber run involved the hauling of chemicals; instead the vehicles used are standard semitrailers, not tankers. Moreover, it is clear that the TU rubber run drivers were paid at a lesser mileage and demurrage rate than its chemical drivers.

In any event, the bulk rubber haul involved the loading of the trailers. Trailers were jockeyed from a storage yard to a

[20] He also claims Navarre gave similar tickets to other drivers. However, his knowledge here is second hand.

[21] Drivers were paid on a mileage basis except for waiting time, which was calculated on a hourly basis.

dock at the Goodyear plant where they were loaded by Goodyear warehouse personnel. Confusingly, the drivers here called the trailer shuffling ''loading.'' When they refer to ''loading'' they are really talking about trailer spotting and movement to and from the dock, a job more accurately described as ''hostling.'' For the most part, Goodyear employees both loaded and hostled the Tyler-bound rubber trailers. They seem to have also done both for the RDR Lawton-bound trailers. However, because of the limited hours of access at the Beaumont plant Navarre said it was impossible to schedule the hostling of those trucks by the over-the-road drivers. He says: ''In agreement with them . . . [TU's] Dennis Negrey, Jack—Mr. Parrish, if the TU drivers wanted to make a little extra money . . . they were familiar with the plant, and they were allowed to load (hostle) these trailers, move them in and out of the plant.'' He agreed that TU actually paid them for loading even Lawton-bound trailers, saying that a bookkeeping arrangement was made whereby Goodyear reimbursed TU for the hours which those TU drivers spent performing loading [hostling] functions. Similarly, an identical bookkeeping arrangement was made to reimburse TU for the wage payments made to its drivers who served as fill-in dispatchers.

It should be observed that the frequency of TU drivers hostling Lawton-bound trucks has not been demonstrated in the record. Moreover, it is clear that TU's management, i.e., Negrey and Parrish, were specifically involved in the decision to permit its drivers to do it. Finally, according to Navarre, hostling these trailers was regarded as ''extra work'' or a way for a TU driver to earn additional money. It has not been shown to have been mandatory.

This bookkeeping arrangement is consistent with the way driver David Coney was treated on one occasion. Coney was a TU driver working on the Tyler rubber run. He testified that sometime in the first part of April 1990, he was ''assigned'' to make a couple of rubber hauls to Lawton by Navarre. He also said that Navarre told him that he would be paid for those runs by ''Ryder'' (RDR). However, he had difficulty getting a paycheck from RDR. After complaining that he hadn't been paid, he eventually received checks from TU to cover that work.

I do not think it takes a great deal of expertise to conclude that because Coney was not a regular RDR employee, and had not filled out any RDR employment application forms that RDR had no way of paying him as an employee, for he was not on their payroll. Even so, Navarre knew RDR owed Coney for those runs and undoubtedly arranged for a reimbursement from RDR through TU. It appears to me that this is significant evidence showing that Navarre had no authority to ''transfer'' employees from TU to Ryder and back.

Moreover, Navarre testified that when the Lawton run was created, several TU employees applied for that run. He says they were asked to fill out RDR application forms, take new physicals, take a new driving test, and were eventually hired as RDR employees.

The General Counsel also asserts that Navarre had transferred Coney, who had been hired as a TU isoprene driver, to the Tyler rubber run in April, citing to a portion in the record where Coney so testified. However, Coney had earlier explained that Navarre had come to him in April and asked him to run two rubber loads to Tyler and that Coney had agreed to do so. It should be noted here that Coney had been hired only a month before, at a time when the Tyler rubber run had not yet begun, but was under consideration. He was TU's most junior driver at that location.

Thus, it looks as if, despite his testimony, Coney was hired for the rubber run. Furthermore, even if he was not, Navarre's so-called request that he take the rubber run and his agreeing to do so would not qualify as an ''assignment'' as the General Counsel wishes to use that term. Coney's own testimony suggests that he liked it and was happy to stay with it after he had volunteered to take it.[22]

In the same reference to the record, counsel for the General Counsel asserts that Navarre had also transferred Hebert to the rubber run. The record at that reference point does not refer to Hebert in any way. Hebert will be discussed in more detail below.

In reviewing the evidence of interchange and transfer, I am impressed with the lack of regularity which has been shown. Each circumstance, ''relief'' dispatcher and temporary work ''assignments'' appear to have been on an ad hoc basis, aimed at filling an immediate, transitory need. I am also impressed by the uncertainty of it all. The testimony is vague and unsettled. Therefore, I find it to be of little value in the overall scheme of things as described by the General Counsel's case.

I. *Daily Supervision and Employee Direction*

Prior to the driver leasing arrangement commenced in September 1985, the tank drivers which had until then been directly employed by Goodyear were assigned runs by Goodyear dispatchers. The head of that office at that time was Navarre. The record does not demonstrate exactly what Navarre did at that time except to assign runs to drivers based on the needs of the plant. Then, as later, Goodyear plant engineers would advise the dispatching office of the plant's needs and runs would be assigned. The record does not show what, if any, independent judgment Navarre was permitted to use prior to the TU takeover.

Navarre testified that RDR approached him during the 1985 negotiation stages and asked him if he would agree to be in charge of the Goodyear dispatch point. He did so, and there appears to have been a short hiatus between the time he left Goodyear and the time he went on duty with RDR. There is no evidence that Goodyear asked RDR to hire him.

In any event, several months later, RDR began operating the dispatch office. TU immediately imposed on it a driver rotation system. This obligated Navarre, or his dispatchers, to select drivers for runs based on the order set forth in the list. This, of course, was subject to some changes, specifically to comply with those Department of Transportation rules which limited drivers to a maximum number of hours per week. In addition, there were personal matters such scheduled days off, vacations, and absences for illness and other normal scheduling matters. I think it is fair to say that the TU system was not initially put in place. It took several months to become well established. It was not until after several drivers complained that the work was not being distributed fairly that Negrey took steps to enforce use of the list.

[22] Eventually Coney became unhappy with that run sometime in June and began seeking a return to the isoprene haul. As noted the mileage rate and the demurrage rate on that route were less.

In fact, there is some anecdotal evidence regarding a disagreement between Painter and Navarre regarding the factors to be utilized in making driver assignments. Eventually, and certainly by the end of 1986, TU's driver assignment policies had become well established. That is not to say that the drivers were totally satisfied. There continued to be driver complaints and accusations of favoritism. However, these were directed at contentions that some dispatchers were favoring specific drivers and seem to have been on a personal basis, not an institutional one. Negrey and Painter were occasionally called in to straighten these matters out.

On daily matters the drivers were not subject to anybody's direct supervision. All were experienced chemical tank truck drivers and all had been highly trained and were knowledgeable about safety rules, logging requirements and were generally aware of the runs they were to make. While on the highway they were responsible for their own conduct. It is true that they were to keep in touch with the dispatch office with respect to delays which they encountered so that the office could make adjustments where necessary.

During the first months of the leased driver arrangement, the drivers did not seem to have a TU official with whom to consult. That, of course, was during the period where TU, RDR, and Goodyear all believed that RDR would shortly assume responsibility for the direct employment of those drivers. Even before RDR's failure to obtain the authority to make intrastate hauls, TU realized that its arrangement was becoming more or less permanent. Accordingly, early on it began supplying its drivers with toll-free telephone numbers and pagers so they could contact TU management as necessary. Although the record is not definitive on the point, it appears that sometime in early 1986, TU established a Texas office near Dallas and manned it with a regional manager, Jack Painter. Painter was responsible not only for the Goodyear account but for other accounts as well. The record does not clearly establish what geographic territory was covered from the Texas office, but it seems to have been extensive.

It is true that a small number of drivers claim not to have known about the toll-free numbers or the paging system, but their ignorance appears to be due to their own neglect or else they lack credibility on the point. Most knew about and used the two systems. Thus, if a driver deemed it necessary to seek guidance from TU, he could easily reach Negrey and, later Painter, within a short time. Even so, some of their communications probably went first to the RDR dispatchers. The intrastate runs with which they were concerned were not particularly long; indeed, it was common for a driver to make as many as three runs per day from the Beaumont plant. They often saw the dispatchers, so speaking with them was a natural thing to do.

As all three Respondents have observed, the drivers' daily routines and procedures were closely governed by Federal and state regulation. Their number of hours per week were limited by regulation, as were the imposition of logging requirements, safety inspections, safety procedures, and highway behavior.

Thus, on a day-to-day basis, there was virtually no hands-on supervision. I agree that TU ''relied'' on Navarre and his staff for information and to carry out the task of assigning drivers to particular runs, the latter based on the TU-formulated rotation list. Connected to that, of course, is the task of timekeeping for payroll purposes. In addition, because Goodyear held the state-assigned status of ''private carriage operator'' it was obligated to maintain certain driver records such as licenses, physical examination records, and driver test results. Consequently, RDR served as Goodyear's collector and repository of that sort of information. All of these tasks, following established routines, are regarded as nonsupervisory and the Board has so held. *Helms Motor Express*, 107 NLRB 132, 134 (1953); *Overnite Transportation*, 128 NLRB 723, 724 (1960) (city and local dispatchers); *Norfolk, Baltimore & Carolina Lines*, 175 NLRB 209, 210 (1969); *Browning-Ferris, Inc.*, 275 NLRB 292 (1985). These functions are mostly clerical.

Even assuming that Navarre was a statutory supervisor, his supervisory authority extended only to his own staff; it did not actually extend to the TU drivers. I recognize that many of the TU drivers regarded him as their supervisor, and in a nonlegal sense he was. He was the head of the dispatch office and it was through that office that the work assignments were transmitted. Furthermore, he had some oversight, although not exclusive, over safety matters. That oversight, however, was endemic within the plant. There was no one within that plant who did not have the responsibility to prevent accidents. That duty extended from employee to employee, from manager to manager, and from company to company. Therefore, the fact that Navarre participated in safety matters or made safety-related admonishments is only part of the general atmosphere found in this, and most, chemical plants. It did not imbue him with supervisory authority over the TU drivers. I conclude therefore that daily supervision was virtually nonexistent, for it was unnecessary. To the extent that first-line independent judgment was required, it was exercised by Painter, or later by Parrish, from Dallas.

In fact, Parrish testified that he routinely visited Beaumont and other customers in the course of his duties. He did not arrive in Dallas until June 1990. Even so, one of his early instructions was to tell drivers that they were not to operate ''illegally.'' By that he meant, and the drivers testified, they understood that they were to adhere strictly to the Department of Transportation hours limitations. In emphasis, he instructed the drivers to notify him in the event anybody from RDR asked them to run ''illegally.'' He reminded those drivers that if they did, it was an offense for which they would be discharged.[23] Parrish's oral admonishment here was simply the enforcement of one of TU's standing drivers rules, first published in November 1985. Each driver had a copy of those rules; another had been posted for years in the dispatch office.

These procedures were not difficult to understand or follow. Daily supervision, as that term is defined in the Act was not necessary. All of the chemical drivers were experienced and knew their jobs. The same can be said later when the rubber run began. The principal difference between the two runs, in terms of responsibility, was that the rubber run did not involve the hauling of flammable liquid. In circumstances where the driver deviated from the routine, the departure nor-

[23] In this regard, depending on the nature of the violation, the Department of Transportation could administratively fine TU the Texas Railroad Commission could revoke TU's operating authority, and the offending driver himself could be subject to criminal sanctions for falsification of his logs.

mally came to RDR's attention, but it was not RDR which made any independent decision to take corrective measures. Its occasional admonishments regarding a driver's shortcomings did not amount to the exercise of independent judgment, only the application of TU's established rules and policies.

J. *The Business Arrangement Between Goodyear and TU*

On August 29, 1985, officials of TU and Goodyear executed the basic agreement under which they operated from September 1, 1985, through December 16, 1990. The agreement appears to have been drafted by TU, for the references to Goodyear are through fill-in blanks. All references to TU are typed out in the original format. Characterizing Goodyear as the ''private carrier'' and itself as the ''Lessor,'' the agreement provided that TU was to furnish Goodyear with drivers to operate vehicles owned or leased by Goodyear. It requires TU to furnish drivers who possess the qualifications mandated by the Federal Highway Administration, the Department of Transportation and any other Federal or state regulatory agency having jurisdiction over the drivers. It insists that evidence of those qualifications be available to the ''Private Carrier'' at all times.

It also sets forth that TU shall be the employer of such drivers and that it will pay the drivers and make the proper income tax and social security payroll deductions, pay unemployment and disability insurance as required by Federal and state (including local) laws, provide Workers' Compensation insurance for the drivers as required by state law as well as paying the premium therefor, file with the appropriate Governmental agencies or authorities all returns and reports required in connection with those payments, and demonstrating to Goodyear, via a certificate of insurance from the insurance carrier, that the Workers' Compensation insurance had been provided.

The contract also mandates that TU submit a weekly invoice covering the payroll for each driver it provided and that Goodyear promptly pay it in accordance with the rates set forth in Schedule A, an attachment.

The basic agreement further provides that Goodyear is to prepare and keep all work records, hours of work, physical examination results, and Federal Highway Administration-required documents on file. It directs Goodyear, as a private carrier, to maintain and retain drivers' logs and inspection and vehicle condition reports as they may be required by either the Federal Highway Administration or the State.[24] The operational control clause, quoted supra, follows.

The operational control clause also includes language which delegates which of the two entities has responsibility in the event that a labor union organizes the leased drivers. It states:

> Lessor [TU] agrees that as the employer of the drivers furnished to Private Carrier [Goodyear], Lessor shall assume the sole obligation of dealing with any labor organization representing or claiming to represent such drivers. Lessor further agrees to defend and indemnify and hold Private Carrier harmless against any grievances arising under a labor contract filed by a driver furnished to Private Carrier by Lessor or such drivers' collective bargaining agent and arising out of the employment relationship between Lessor and such drivers or any collective bargaining agreement then in effect between Lessor and such collective bargaining agent, provided, however, that it is Lessor and not the Private Carrier who committed, instituted or directed the act which gave rise to the grievance.

It goes on to say that in the event that the private carrier Goodyear committed an act which caused the violation of the collective-bargaining agreement then it would indemnify TU.

Another provision states that TU will not be held liable to Goodyear in the event that it is unable to furnish drivers because of ''strikes, lockout, or any other contingency beyond [its] control.'' Finally, it contains a clause permitting either party to cancel the contract on a 30-day written notice.

Attached to the agreement was a so-called schedule A. That schedule, couched in terms which were written by TU, not Goodyear, sets forth the drivers' wages, both the hourly demurrage rate and the mileage rate, vacation eligibility rules, paid holidays, and the cost of health insurance. That portion concluded with the statement that ''All wages and fringe benefits will be reviewed on a yearly basis.'' It is followed by a weekly service charge for each employee together with notations regarding the amount of (or the formula to be used for) state and Federal taxes and insurance payments. The last paragraph of schedule A states: ''All payroll costs, cost of driver physicals and abstracts, are charged back to you [Goodyear] at the same cost we [TU] pay, not subject to service charges. Service charges apply to the gross payroll amount only. Driver expenses will also be charged back to you [Goodyear] on a dollar for dollar basis.''

The schedule A which is in evidence was the one in effect in 1985. There is evidence at various places in the record that subsequent Schedule As were negotiated and placed in effect.[25] That is consistent with the annual renegotiation which the quotation describes. However, none of the more recent Schedule As have actually been offered or received in evidence.

Nonetheless, using the 1985 version as a guideline, it is apparent that it is a document principally drawn by TU to describe the payroll reimbursement which Goodyear was obligated to pay under the driver lease contract. It is, at its most basic, a ''cost-plus'' contract, i.e., a contract under which a customer provides payment for services rendered by the seller based on the actual out-of-pocket cost incurred plus a gross profit.

[24] Goodyear, as noted in sec. I, accomplished the recordkeeping through its contract dispatcher, RDR.

[25] In addition to the schedule A covering the chemical isoprene drivers, sometime in the early spring of 1990, a similar document, schedule B, was created covering the drivers to be assigned on the Kelly-Springfield (Tyler, Texas) rubber haul. By that time schedule A had bumped the isoprene drivers to an hourly rate for demurrage to $10.60 per hour. The rubber run drivers' rate was less, $10 per hour. As with the chemical drivers, the bulk of their wage came not from the hourly rate, but from the number of miles they drove. The hourly rate covered waiting time only.

K. *Evidence of Goodyear's (Non)Involvement in Collective Bargaining*

As previously noted, subsequent to the Charging Party's certification as the exclusive collective-bargaining agent after the NLRB-conducted election on June 6–7, 1990, five collective-bargaining sessions were conducted. Representing the Union were Business Agent Sergio Ponce and a few drivers including Zerengue and Cain. TU was represented by Negrey and Parrish.

Zerengue says that he recalls another TU official being present on one occasion but can't remember who it was. Neither Goodyear nor RDR was represented at any negotiation meeting.

Ponce and the two drivers readily agree that negotiations went reasonably well with respect to nonmonetary matters and that except for wage issues a final contract was quite close, even though the parties had only five meetings.

As recounted earlier, the Union had asked for an increase in both the mileage and hourly rates. In October, in reply to the Union's demand for increased wages, Negrey told Ponce that he was concerned that if he agreed to a wage increase which was higher than Goodyear was willing to pay, TU might lose the contract altogether. He did say that he would consult with Goodyear to see what ''perimeter'' (Zerengue's word) which Goodyear might be able to provide.[26]

However, even as that type of conversation was occurring, United DSI had obtained hauling authority as a common carrier to transport isoprene intrastate. The Texas Railroad Commission in September or October had granted United DSI a tariff for that purpose. Word of that grant came to Negrey's attention somewhat informally from a Goodyear official. Negrey immediately advised Ponce during one of the negotiation meetings.

On a factual basis, therefore, I do not find any evidence that Goodyear actually participated in the collective-bargaining process. At best, given the cost-plus nature of the business arrangement between Goodyear and TU, Negrey's statement that he needed to discuss with Goodyear the amounts of remuneration increases to which Goodyear might agree, is nothing more than discussing the reality that one could price oneself out of the market if one was not careful. He was well aware that other leasing companies could also provide the same services which TU sold. He also knew that schedule A was about to be reconsidered at the first of the year. He thought there was some likelihood that Goodyear would agree to paying a higher amount in remuneration. What he didn't know was how far Goodyear would go. He needed to determine what the market would bear before he could respond intelligently to the Union's demand. That is quite different from Goodyear ''controlling'' the wage levels.

L. *The Effect of the Board's Certification*

On April 19, 1990, as previously noted, the Union filed its petition for a representation election. It named as the employer only TU. Subsequently, TU and the Union entered into a Stipulation for Certification on Consent Election. That document was approved by the Regional Director and the election was conducted on June 6–7, 1990. No objections were filed and on June 18, 1990, a Certification of Representative was issued in favor of the Union, running only to TU's employees, as per the stipulated agreement for an election.

All three Respondents argue that they may rely on the Regional Director's ''finding'' that the employer for the purposes of this case is only TU. Both RDR and TU argue that Board and court rulings have held that employers may rely on unappealed Regional decisions in representation case matters. They also argue that if the matter could have been raised in the representation process but was not, then it may not be considered in the subsequent complaint case. In this regard, they cite such cases as *Shannon & Luchs*, 166 NLRB 1009 (1967); *Maxwell Co. v. NLRB*, 414 F.2d 477 (6th Cir. 1969); *Transportation Enterprises v. NLRB*, 630 F.2d 421 (5th Cir. 1980); and *International House v. NLRB*, 676 F.2d 906 (2d Cir. 1982).

In general it can be said that the cases on which they rely do not quite stand for the proposition which they propose: i.e., that both the Union and the Board are bound by what the parties consent to during a representation election. It may well be they are bound if the matter has truly been litigated, particularly an issue such as unit description. However, unit description is not the issue here, but whether Goodyear and RDR can rely on what they regard as a Regional Director-approved legal conclusion that TU was the sole employer. The cases on which they rely are distinguishable in many ways and I do not regard myself bound by them.

The fact that the Regional Director adopted the TU-Teamsters stipulation in that regard is of little significance. The adoption is mainly a matter of efficient processing of representation petitions. It is only common sense that if the parties to a representation proceeding are satisfied with their agreement and if it does not clearly breach any important policy of the Act, then the Regional Director, too, will be satisfied. That is not to say that he might not reach a different conclusion if the matter is actually litigated. Of course, the stipulation for certification precluded the litigation of any issue such as joint employer.

However, I must agree that the Union's decision to name TU as the employer in the representation case is due some weight. Teamsters Representative Ponce testified that he was aware of the relationship between/among the three employers. He knew that RDR was the dispatcher and he knew Goodyear was the factory. He further knew that TU was a lessor of drivers. Despite his knowledge, he nonetheless chose to name only TU as the employer whose employees his union sought to represent. That seems to me to be an admission worth some weight.

Another fact which I find to be of importance is that the Union never contended that a joint employer relationship existed until it learned from TU that TU's contract with Goodyear was being canceled. Late timing such as this has been considered to be a factor mitigating in favor of finding that no joint employer relationship existed. See for example *Southern California Gas Co.*, 302 NLRB 456, 461–462 (1991), and *United States Steel Corp.*, 270 NLRB 1318 (1984).

On balance, I conclude that because the Union knew at the time it entered into the Stipulation for Consent Election that TU was the lessor of drivers and also was aware of the prob-

[26] To the extent that Ponce and Cain testified that Negrey said he had to get Goodyear's ''approval'' for a wage increase, that testimony is discounted. It is obviously an attempt to characterize Negrey's statement rather than to recount it.

able relationship between TU and Goodyear, and Goodyear and RDR, it made a deliberate decision, comparable to a waiver, that the only employer with whom it intended to bargain was TU.[27] Furthermore, its belated contention that those two companies were joint employers with TU is another factor which mitigates in favor of finding that no joint employer relationship existed.

M. *Conclusions with Respect to the Joint Employer Issue*

I conclude, based on the foregoing evidence, that the General Counsel has failed to establish that Goodyear or RDR was, during 1990, a joint employer with TU of the over-the-road drivers hauling either isoprene or crude rubber. First, and playing a significant role, is the fact that none of the employees reasonably held the opinion that they were employed by Goodyear. It is true that one of the motivations for their seeking union representation was their perceived inability to deal effectively with RDR, which, given its role as Goodyear's contract dispatcher might be deemed Goodyear's surrogate.

Even so, by 1990 all of the employees knew or should have known that their employer was TU. They had filled out job application forms for TU, had been paid by TU on TU paychecks, were receiving fringe benefits arranged for by TU including health insurance and an individual retirement account, added in 1989. They also knew that significant personnel matters were always processed by Negrey, Painter, or later Parrish. These matters included difficulties the drivers experienced with proper wage payments, health insurance claims, and resolving the perceived unfair dispatches of which some of the RDR dispatchers were supposedly guilty. The only incident in a 5-year period to which the General Counsel points involving Goodyear is Ozio's claim that after a dispatcher, acting on Navarre's direction, ordered him outside the fence, Goodyear's Beverly countermanded the instruction. That contention is both stale and stands in isolation, if believed.

Although the drivers discussed their supposed confusion with Teamsters Business Agent Ponce, and Ponce was fully aware of the various roles each of the three putative joint employers played, he chose to file an election petition with the Board naming only TU as the Employer. Furthermore, while the Board was processing that petition, the Union dealt not with RDR and not with Goodyear, but with TU. Indeed, the Stipulation for Consent Election is signed by a TU official. Therefore, the Union bargained collectively only with TU, never asking Goodyear or RDR to share any responsibility.

I recognize that some of the employees during the hearing testified that their employer was ''Goodyear'' and they appear now strongly to hold that opinion. Nonetheless, during the time when the initial charges were pending against TU, each of those employees told the Board agent who investigated the case that their employer was indeed TU. They made no contention that they were also employed by Goodyear or RDR. It was not until the Charging Party decided to pursue a joint employer theory, when it filed the subsequent charges, that the same employees changed their tune and asserted that they were now employed by Goodyear or ''Ryder.'' Indeed, RDR is an entity none of them really recognizes; they regard all the Ryder System, Inc. subsidiaries as ''Ryder.''

Yet, the evidence shows none of the employees really believes that RDR or any of the Ryder subsidiaries is his or her employer. They all acknowledge that Ryder serves as a contract dispatcher for the Goodyear plant. They are also aware that Ryder was unable to resolve payroll and fringe-benefit discrepancies. Thus, none of them reasonably held the belief that RDR was one of their employers. If so, RDR would have been able to resolve some of these matters. In fact, it was RDR's very lack of response to them that drove them to seek union representation. In essence, the petition was a call to wake up TU to the problems those employees were perceiving.

The foregoing, of course, is an analysis of the drivers' subjective beliefs. Those beliefs clearly lead to the conclusion that they knew they were employed by TU, not by RDR and not by Goodyear. They knew from the beginning they were leased drivers employed by a leasing company.

Nonetheless, there is objective evidence as well demonstrating the lack of a joint employer relationship. Again, I point first to the evidence of whose name was on the paychecks, who was responsible for fringe benefits, and who actually resolved payroll discrepancies—always TU. Beyond that, however, are the factors set forth in *TLI, Inc.* and *Laerco*, both supra. *Laerco* describes the significant factors as hiring, firing, discipline, and supervision. In the factual section above I have already discussed the fact that the post-1985 hiring decisions were all made by TU. It is true that on occasion RDR's Navarre attempted to influence the TU decision on hiring. He also attempted to influence the decisions on firing. His recommendations, however, were often ignored.

With respect to the August 1985 hiring, although there is testimony from several drivers that Ryder was doing the hiring, at least one driver, Hoke, testified that Navarre did not do the hiring but TU did. It is true that TU and Ryder both interviewed individuals at that time, and Ryder Truck was later asked to road-test the applicants. Even so, TU paid for the physical examinations and for the test certifications. Nonetheless, as discussed earlier, the 1985 hires have little to do with the 1990 circumstances. By 1986, the new hires knew that TU was doing the hiring. Ozio testified that although he was interviewed by Navarre for the job, he knew TU was doing the actual hiring. Moreover, it appears that Navarre recommended against hiring Ozio but the TU hierarchy decided to ignore the recommendation. Later, drivers Hebert, Sonnier, and Lincoln all testified they knew almost from the outset that TU was their direct employer. In fact Lincoln, in subsequent matters, listed TU as his employer when he applied for unemployment compensation and applied for jobs with succeeding employers.

With respect to discharges, there were very few except for the final layoffs. The only one of significance is Hebert and, as will be seen infra, she had a somewhat mixed experience. She disingenuously claims to have been hired by Navarre in

[27] If that were not so, then the certification would have no bounds. Such a lack of limitation, coupled with an extension such as is sought here, has resulted in a finding of a deprivation of due process from a putative joint employer. *Alaska Roughnecks & Drillers Assn. v. NLRB*, 555 F.2d 732, 735 (9th Cir. 1977). Cf. *Hughes Aircraft Co.*, 308 NLRB 82 (1992).

February 1990, but concedes that she knew by the next day that her employer was TU. She also says that Navarre laid her off in April 1990 as a chemical driver. It is undisputed that she was recalled by TU's Negrey and continued to work for TU until her discharge on November 29. At that time it was TU's Parrish who discharged her. She also asserts that it was Navarre who transferred her from the chemical haul to the rubber haul.

In viewing her testimony, it became clear to me that Hebert's ability to discern what was happening and accurately to describe events is limited. For example, she is absolutely convinced that Beverly threatened to discharge her over the safety glasses' incidents. There is no doubt in my mind that Beverly intended to enforce the safety glasses rule which was plantwide, but there is no reason to conclude his statement that there would ''not be a third time'' necessarily meant discharge. It could easily have referred to something less severe. Her testimony must be viewed with care, not only because she dissembles, but because she has a tendency to overinterpret matters based on insufficient evidence.

Turning to the incidents of discipline, it is quite clear that all of the written documentation implementing a disciplinary action was taken by TU officials. There are numerous disciplinary letters in evidence; none is from RDR or Goodyear. Nor is there evidence that these letters are simply rubber stamps of decisions made by others. For example, RDR's Bienvenu wanted to fire Brown, but TU declined. Indeed, RDR dispatchers Tammy Mancil and Donna Bossette both testified that, consistent with the testimony of TU's Parrish and RDR's Navarre, RDR did the dispatching and kept the records, but that TU was the one which meted out discipline. Parrish says no Goodyear official has ever discussed a TU driver with him during his tenure.[28]

Finally, the day-to-day supervision in this particular fact pattern is of little significance. As previously noted, these drivers are all trained and experienced and know their work. Furthermore, the very nature of their duty, over-the-road driving, does not lend itself to hands-on supervision. To the extent that their conduct may have come to the attention of either RDR or Goodyear, the information was simply passed on to TU which took whatever steps was necessary to correct a shortcoming.[29]

I conclude that counsel for the General Counsel has failed to establish by credible evidence his contention that Goodyear and/or RDR jointly employed the drivers with TU. *TLI, Inc.*, supra; *Lee Hospital*, 300 NLRB 947 (1990); *Southern California Gas Co.*, supra; *Clinton's Ditch Cooperative v. NLRB*, 778 F.2d 132, 138, 140 (2d Cir. 1985); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Group Discharges*

The General Counsel has alleged that Respondents have committed unfair labor practices violating Section 8(a)(3) and (1) of the Act when TU terminated all the chemical haul drivers on December 16, 1990. He also contends that they all violated Section 8(a)(3) and (1) of the Act on December, 16, 1990, when all the RDR dispatchers were also terminated.

In this regard, counsel for the General Counsel elicited evidence on both sides of the question. He adduced testimony and documentary evidence from some adverse witnesses and offered similar testimony from employee witnesses. In many respects, counsel for the General Counsel proved Respondent's defense; in other respects he undermined his own evidence.

First, it is clear from the testimony of Goodyear's Beverly that Goodyear has for years been attempting to locate a common carrier which had a permit from the Texas Railroad Commission to haul isoprene on intrastate runs. Such carriers were not available in 1985 when it chose to begin leasing drivers. Its arrangement with TU, the leasing company, was terminable on a 30-day notice. Obviously if a common carrier could be found, Goodyear wanted to be able to quickly substitute it for TU.

In 1990, the Texas Railroad Commission finally granted such a tariff. One of the companies obtaining that tariff was United DSI, which insofar as is shown in this record, is unrelated to any of the respondents.[30]

Although TU's Negrey had heard rumors that the Goodyear-TU agreement was in jeopardy, it was not until he received a letter dated November 21, 1990, from a Goodyear vice president in Akron, Ohio, that he officially learned about the situation. That letter, referring to the August 29, 1985 lease agreement, stated in part: ''Because we have determined to abandon this private carriage operation and will be able to obtain the services of an intrastate common carrier [to haul isoprene] at a substantial savings over our total cost as a private carrier, we will no longer require your [TU's] services under the agreement.'' It went on to propose that the agreement be terminated effective December 30, 1990.

On November 26, 1990, Negrey wrote Teamsters Business Representative Sergio Ponce a letter which I quote in its entirety:

> We have been advised by our customer, Goodyear Tire & Rubber that they are terminating our agreement

[28] It is true that Mancil believes Navarre terminated Hebert in November 1990, but she is clearly mistaken. In fact it was her report to Parrish which triggered his investigation resulting in his decision to terminate Hebert.

[29] I think it is likely that on occasion Navarre allowed himself to appear as if he were the drivers' supervisor. The fact that he did so does not mean that he was doing it with the authority of TU or with the authority of anybody other than himself. Once he and Painter had an argument about who had responsibility over those drivers. This resulted in correspondence from Negrey advising Navarre to follow the dispatching preference list which Negrey had prepared. I think Navarre had some difficulty accepting that admonishment, particularly because he had been responsible for the drivers during his tenure as the Goodyear supervisor prior to 1985. It was a duty which he, for personality reasons, could not easily give up. His self-appointment in this regard does not demonstrate that he had real authority on day-to-day matters. All he could really do was to report to TU and allow a TU official, usually Negrey or Painter, and later, Parrish, to make whatever decision was appropriate. As can be seen, he attempted to make recommendations along with his reports. Even so, these recommendations were not always followed. He did not have independent authority over these drivers. His entire job was circumscribed by TU rules and dispatching preferences. To the extent that he deviated from those, he was acting outside the scope of his authority.

[30] The General Counsel has adduced no evidence whatsoever about United DSI except that it is a common carrier.

> to provide them with leased drivers effective December 30, 1990. This applies only to the chemical operation at their Beaumont, Texas facility. Our attorney left a message for you on 11–20–90 and I left a message on 11–26–90 to advise you of this occurrence. We would like to schedule a meeting to discuss the terminated agreement and shutdown of our operation as well as to continue the negotiations for the employees assigned to the rubber side of the Goodyear Beaumont facility.

It has long been held that there are five principal elements which constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employees alleged to have been unlawfully discharged must have been engaged in union or protected activities or that the employer believed them to have been so engaged. The second is that the employer knew about those union or protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of these activities. Fourth, the employer must do something to either sever or weaken the employment relationship. Finally, the act of employment severance must usually be connected to the union activity in terms of timing.

All parties concede that the first two elements are present, i.e., that the employees engaged in union activity and that the employer knew it. In fact, all of that is part of the public record, for the Board has conducted a representation election in which all the employees voted for representation by the Charging Party. Furthermore, the Board has certified the Union as the 9(a) exclusive collective-bargaining representative of those employees. It may also be said that the employer has severed the employment relationship. However, the most important of the five elements, animus, is missing entirely in the cases against Goodyear and TU. Furthermore, the last, timing, is inconclusive at best, for the General Counsel's purposes. At worst it undermines his case.

I shall begin with evidence of animus. First, although I have previously found that Goodyear was not a joint employer with TU, there is no evidence of animus on Goodyear's part whatsoever. Not a single Goodyear official has even been accused of acts evidencing animus. Second, there is no credible evidence of animus on TU's part, either. Although TU's Negrey was accused of one remark constituting two alleged violations of 8(a)(1) conduct, as will be discussed in subsection F, infra, the conduct was not coercive. Indeed, the incident is pretty well removed in terms of time from both the cancellation of the leasing contract and Hebert's discharge, occurring more than 4 months earlier, and triggered by employee Zerengue's misfeasance. Even Union Representative Sergio Ponce agrees that during the collective-bargaining negotiations which he conducted with Negrey that the parties were nearly at a collective-bargaining contract when Goodyear canceled the leasing agreement.

It is true there is some evidence that RDR's Navarre and Flanary made remarks during the election campaign which may be construed as antiunion. These will be dealt with in more detail below. However, it is clear that the preelection remarks attributed to Navarre were aimed not at TU drivers, but at RDR's own dispatchers. In essence, these remarks, if credited, were designed to prevent the dispatchers from seeking union representation. Later, in December, after both Goodyear's notice of cancellation and TU's notification that December 16 would be the last day of work, Flanary is alleged to have sarcastically advised the drivers that the reason for their termination was because they had chosen the Union.

For the purpose of the 8(a)(3) analysis, I shall assume that Navarre and Flanary made the remarks. The problem with their statements is that neither of them spoke for TU or even for Goodyear. Furthermore, there is no showing that these remarks were anything other than their own opinion. Certainly there is no demonstration that they had first-hand knowledge of how Goodyear's decision came to be made. It was obviously a decision in which neither of them took part and whatever opinion they may have held cannot prove the actual motive. Beyond that, of course, I have already decided that RDR was not a joint employer of TU and whatever animus RDR may have harbored is not imputable to TU. Cf. *Dr. Phillip Megdal, D.D.S.*, 267 NLRB 82 (1983); *Frascona Buick*, 266 NLRB 636, 646 (1983); *Kimball Tire*, 240 NLRB 343, 344 (1979).

With the departure of those 30 or so drivers, RDR's need for a staff of dispatchers also evaporated. In truth, counsel for the General Counsel has adduced very little evidence with respect to the details of the dispatchers' termination from employment. Only three dispatchers testified, Tammy Mancil, Donna Bossette, and Joyce Bacon. Of those three, Bossette had been employed the longest, having been hired in 1988; Mancil was hired in March 1990, and Bacon in July 1990. It appears that all the dispatchers were terminated simultaneously with the drivers on December 16, 1990, although one, Katrina Broussard, may have been hired by United DSI.

According to Bacon, there was very little notice to the dispatchers that they were being laid off. Both Bacon and Mancil recount conversations with their supervisor, Bill Navarre, to the effect that they would not have lost their jobs had the Union not become the drivers' collective-bargaining representative. In addition, all three recount statements made by Navarre after the election that ''Goodyear'' did not want a union telling them how to run their transportation department. None of the dispatchers quotes Navarre as attributing similar statements to any Goodyear official.[31]

At best, the General Counsel has adduced evidence that RDR officials both feared that the dispatchers might also seek union representation and subsequently blamed the TU drivers for the loss of everyone's jobs when they elected the Union. At the same time, the General Counsel has failed to adduce evidence that the dispatchers engaged in any union activity or were believed to have engaged in any union activity.

Furthermore, the timing of the discharge, rather than enhancing the General Counsel's case, undermines it. The decision to terminate the TU contract was made by Goodyear,

[31] All three dispatchers describe conversations with Navarre in which he told them to refrain from union activity, that the drivers wanted TU-employed dispatchers, that the drivers were ''out to get them,'' that they were to follow the rules and write the drivers up for infractions and such matters. The upshot of much of this testimony is that, if believed, Navarre was pitting the dispatchers against the drivers. It should be observed here, that there is also evidence that some drivers believed the dispatchers were ''out to get them'' and were not following the appropriate dispatching rules. Very little of this testimony has anything to do with the issues to be decided in this case.

not TU. And, Goodyear's decision was a direct response to the creation of a state tariff. That being the case, TU had no choice in the matter. It is true that the decision occurred just as a collective-bargaining agreement was coming to fruition, but when Goodyear advised TU that it would no longer require TU's chemical hauling services, TU had no place to go except to announce the termination of the chemical drivers. The ripple effect which the cancellation of that agreement caused is quite obvious: if Goodyear no longer needed leased drivers, it likewise no longer needed contract dispatchers and clericals to perform those functions.[32]

It is clear, therefore, that counsel for the General Counsel has failed to prove the elements of an 8(a)(3) and (1) case with respect to the discharge of either the isoprene drivers or the dispatchers. Instead, he has demonstrated, from his own evidence, that their discharges were solely connected to Goodyear's decision to cancel the TU leasing agreement as its long-term plan to convert to a common carrier came to fruition. Accordingly, there is insufficient evidence to require any respondent to defend the matter. These allegations may be dismissed.

B. *Alleged Unilateral Changes*

The complaint alleges that on December 16, 1990, ''Respondent'' without notice to the Union unilaterally changed the ''wages'' of four named drivers by reducing their hourly rate from $10.60 per hour to $10 per hour. In addition, it alleges that it increased the ''noncompensable waiting time'' of those same employees from 1 hour per trip to 2 hours per trip.

With respect to the first contention, it should be noted that the hourly rate is the tail on this dog. The bulk of the drivers' remuneration came from the mileage rate. The hourly rate applied only to nondriving time, i.e., time spent waiting at one destination or another.

The evidence shows that the waiting time hourly rate for isoprene drivers was $10.60 an hour. The evidence also shows that at all times the drivers assigned to the rubber run received somewhat less, $10 per hour. The four drivers in question suffered both a reduction in mileage rate and in waiting time when, on December 16, they found themselves the only drivers employed by TU at the Beaumont plant. All four, pursuant to negotiations between TU and the Union, were assigned the remaining work, the Tyler rubber run.

As rubber run drivers they received the rubber run rates, i.e., $10 per hour waiting time as well as the applicable mileage rate. It is true that these individuals' ''rate'' was reduced; however, this wage reduction was not due to a change in policy, but to a negotiated change in the job classification they were to perform. Clearly, rubber run drivers and chemical haul drivers were different job classifications and had been so from the outset of the rubber run. Thus, the General Counsel has failed to demonstrate that the change in rate which affected these drivers was the result of the unilateral change in wages, hours, and working conditions. It was instead the result of these drivers being switched from one job classification to another. Proof of the 8(a)(5) and (1) allegation regarding this purported unilateral change is entirely lacking.

The second allegation, that noncompensable waiting time was to be increased from 1 hour to 2 hours, likewise fails. The complaint alleges that this occurred on December 16, 1990. In fact, the General Counsel has adduced no evidence whatsoever that any change in noncompensable waiting time occurred on or after that date. If there was, it was only as a result of chemical drivers being transferred to the rubber run. The principal evidence which the General Counsel adduced on the point seems to have occurred in April 1990, shortly before the employees sought union representation. Indeed, it was during a meeting with drivers to discuss this proposed change that the drivers announced their intention to seek representation by the Union. When that announcement was made, TU's Painter advised that the matter would be put in abeyance and left until the representation issues were resolved. No changes were ever made. Again, the General Counsel's proof on the point simply fails.[33]

C. *The Alleged Refusal to Bargain Over the Effects of the Shutdown of the Isoprene Haul*

As noted, by letter of November 26, 1990, TU's Negrey advised Teamsters Representative Ponce that Goodyear had terminated the lease agreement effective December 30. In that letter he offered ''to schedule a meeting to discuss the terminated agreement and shutdown of our operation as well as to continue to negotiate for the employees assigned to the rubber side of the Goodyear/Beaumont facility.'' The Union's attorney, G. William Baab, replied by telefax on December 11, proposing that the parties meet for those purposes on December 17, 1990. That date was apparently acceptable, but a few days before that date TU's attorney, Sanford Gross, telephoned Baab to advise that because unfair labor practice charges had been filed and meetings had been scheduled (apparently with a Board agent) for the purposes of conducting the investigation, that he could not meet on December 17. As a result of that conversation Baab and Gross ''agreed that the parties would not need to bargain on December 17. There was no arrangement nor agreement concerning further negotiations.''[34]

As alluded to earlier, Ponce and Negrey did reach an agreement with respect to which employees would be assigned to the rubber run after December 16, agreeing that the four most senior drivers would be retained for the rubber

[32] With the advent of a common carrier such as United DSI, the paperwork associated with a private carriage operation no longer needed to be compiled. Thus, even RDR's timekeeping functions were no longer needed.

[33] It is true that driver Christopher Morgan testified that RDR's Flanary told him on December 12, 1990, that he would be paid the $10.60 an hour rate. Morgan acknowledges that never occurred and ultimately he learned that the rubber run rate was only $10. He also says that in making the change from isoprene to crude rubber, he was obligated to give up another hour of uncompensated waiting time. I think it is clear that Morgan believes it to be so, but given the fact that the rubber run is quite different in that it takes 4 or more hours to go from Beaumont to Tyler, as opposed to the short isoprene hauls in and around Beaumont, that he really cannot say with accuracy what the actual practice was. He is the only driver who gave any testimony on the point, and he lacked competency to know the actual circumstances. Moreover, Flanary apparently did not realize he was making a mistake. He may not have known what arrangements the Union and TU had made.

[34] The quoted language is a stipulation of fact.

run. Those individuals were Morgan, Fontenot, G. L. Vickery Sr., and P. J. Permenter.[35]

There is no evidence that the Union ever sought to reschedule the meeting over the effects of the shutdown. The duty to demand such bargaining always rests with the union. Accordingly, because the Union did not pursue its demand to bargain over effects after its agreement to postpone the December 17, 1990 meeting no unlawful refusal to bargain over effects has occurred.

D. *The Information Requests*

As previously found, the General Counsel has failed to prove that Goodyear, RDR, and TU are joint employers of the drivers in question. That finding necessarily undercuts those allegations in the complaint that Goodyear and RDR failed to supply certain information to the Union. In circumstances where Goodyear and RDR were not joint employers of the employees in question, they were not under any obligation imposed by the Act to provide information to a union representing the employees of another. Furthermore, the Act requires that the information being sought be relevent to either the collective-bargaining or representational processes. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). I shall nonetheless attempt to detail the evidence involving all three respondents.

With respect to Goodyear, the complaint alleges and Goodyear admits that by a letter dated November 15, 1990, the Union requested Goodyear to provide information concerning ''all current and expired contracts, written agreements, memoranda of understanding, and related documents between Respondent Goodyear and Respondent [TU] and between Respondent Goodyear and Respondent Ryder Truck Rental, Inc.'' By letter dated November 16, Goodyear's plant manager, S. K. Gartside, replied that the agreements and contracts which it had with its vendors were proprietary and confidential; he declined to provide the information.

First, I observe that the request insofar as it related to material from Ryder Truck is a non sequitur in this proceeding. Although Ryder Truck has been named as a Respondent, there is absolutely no evidence whatsoever that Ryder Truck has been involved in the day-to-day operation of vehicles by these drivers. It is true that Ryder Truck is the lessor of the vehicles which the TU drivers operated. It also maintained those vehicles under its agreement with Goodyear. However, the Union's request for information regarding Ryder Truck's relationship to Goodyear does not meet the test of relevance and is well outside the Union's legitimate scope of interest.

Insofar as it seeks business agreements between Goodyear and TU, that information was available on request from TU, the employer to whom the Union's certification ran. Goodyear, as a separate employer, had no obligation to provide that information.

The Union's demands with respect to RDR are only a little different. Again, the complaint alleges that by letter dated January 15, 1991, the Union asked RDR to provide information concerning ''current and expired contracts, written agreements, memoranda of understanding and related documents between RDR and TU and between RDR and Goodyear.'' A subsequent allegation alleges that by another letter also dated January 15, 1991, the Union asked RDR to provide information concerning logs and other documents and records reflecting the dispatch of TU's drivers from June 18, 1990, to January 15, 1991, in Beaumont. Similarly, a third allegation asserts that in a letter dated January 18, 1991, the Union asked RDR to provide information concerning payment records from Goodyear to RDR, to Ryder Truck and Ryder System from January 1, 1989, to December 31, 1990.

The Ryder respondents in their answers, admit receiving the letters in question. However, they denied the remaining allegations. The General Counsel has adduced no evidence whatsoever regarding what their actual response was, if any. Moreover, neither the General Counsel nor the Union has made any showing that the Union needed this information for the purpose of collective bargaining. Their relevance to the issue has not clearly been shown. Assuming that the material is relevant, the entire matter is doomed because none of the Ryder respondents is an employer of the employees in question. Moreover, the evidence shows that RDR, which may have been the initial collector of some of this information, transmitted it either to Goodyear or to TU. Some of those transmittals were during the course of the business relationship; others occurred in December when RDR shut down the Beaumont dispatching office and transferred its dispatching operations to Houston. In addition, the evidence also shows that RDR no longer had many of the files because they had been taken by one of its dispatchers, Tammy Mancil.[36]

As far as TU is concerned, the complaint alleges that it has committed several acts which supposedly violate Section 8(a)(5) and (1). The first is a contention, paragraph 12, that TU since October 27 has refused to bargain with the Union concerning Goodyear's decision to terminate the contract covering the isoprene-hauling operation. Little needs to be said about this allegation. I have previously found that the General Counsel has failed to prove Goodyear to be a joint employer with TU. Because the allegation assumes that the two are joint employers, it fails, for there is no way that one employer can bargain with the Union over the business decisions of an unrelated business entity.

Assuming, however, that it can be read as an allegation that TU failed to bargain over its own decision to terminate the isoprene hauling operation, the complaint still fails. The Supreme Court has held in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), that such decisions, affecting the fundamental course and direction of a business is not a mandatory bargaining subject. Thus, although it may be fairly said that Goodyear made TU's decision for it by canceling the leasing contract, TU had to decide what to do with the direction of its business when the contract was canceled. It made the only decision open to it, to terminate the Beaumont isoprene hauling operation. That was a fundamental change in the course and direction of the business within the meaning of *First National Maintenance Corp.* Accordingly, the complaint fails to allege a violation of the Act.

[35] Three of these four were known to be union adherents.

[36] Mancil's possession of many of RDR's records is most unusual. When the office was being closed, they were put in her car and she took them home. Mancil was subsequently selected by counsel for the General Counsel to be his representative witness as an exception to the sequestration rule. She, of course, is also an alleged discriminatee.

Next, the complaint alleges that TU failed to supply the Union with information regarding Goodyear's decision to terminate the leasing agreement. Specifically it asserts on October 18 and November 8, 1990, the Union asked for the information in question. The evidence shows, however, that Negrey in fact did give the Union the information it had, i.e., that there was a rumor in progress which suggested that Goodyear was going to replace TU with a common carrier. TU was not officially notified of the decision until Goodyear's letter of November 21, well after the October 18 and November 8 requests. Thus, TU had nothing solid to give to the Union until it received the November 21 notice. Negrey advised the Union of this development by his letter of November 26, 1990, having failed to reach Ponce earlier by telephone. Accordingly, because there was nothing to provide to the Union at the time of the demands, and as the information it received shortly thereafter was promptly passed on, no violation has occurred. Cf. *Litton Microwave Cooking Products*, 300 NLRB 324, 334–336 (1990).

The following allegation is that on November 15 the Union requested TU to provide information concerning ''all current and expired contracts, written agreements, memoranda of understanding and related documents between TU and Goodyear and Ryder Truck.'' As we have already seen, there is no business relationship between TU and Ryder Truck (nor is there any business relationship between TU and RDR). Thus, there were no TU-Ryder agreements to provide, assuming they met the test of relevance, something which has not clearly been shown. Accordingly, that portion of the allegation is without merit.

With respect to the business agreements between TU and Goodyear, it does appear that TU did not provide the information at that point. However, it is also true that the Union admitted that it already had in its possession copies of the contracts which had been found by driver Morgan and turned over to the Union before bargaining even began. It therefore had the information in its possession and, assuming that the Union wanted to verify its currency, it has not made a showing that TU's lack of response in any way prejudiced its ability to bargain. Teamsters Representative Ponce admits he already knew the contract was of a ''cost-plus'' nature. In that circumstance, TU's lack of response was essentially harmless.

I note that their relevance has not clearly been shown. The demands were made after the Union began filing charges. Therefore, if the demands were simply an effort to discover evidence for the purpose of litigation, they are not producible. *WXON-TV*, 289 NLRB 614, 617–618 (1989). I also observe that TU has not ever claimed an inability to pay any wage demands made by the Union. It only informed the Union that it needed to find out what its customer, Goodyear, was willing to pay before it responded to the Union. Therefore, its obligation to provided financial data has not been triggered. *Nielsen Lithographing Co.*, 305 NLRB 697 (1991); *Concrete Pipe & Products Corp.*, 305 NLRB 152 (1991); *Burruss Transfer*, 307 NLRB 226 (1992).

And, to the extent that the information sought was for the purpose of bargaining over the decision to shut down, since TU had no duty to bargain over that decision, it had no obligation to provide contracts describing the business relationship with its customer, Goodyear. *BC Industries*, 307 NLRB 1275 (1992).

Finally, the complaint, paragraph 14(f), asserts that by letter dated January 18, 1991, the Union requested TU to provide information concerning records of payments received by TU from Goodyear for a 2-year period beginning January 1, 1989, pursuant to the contract. First, it is not clear that business payments between two businesses are relevant either to collective bargaining or to the Union's duty as bargaining representative. Certainly the General Counsel has failed to demonstrate the relevance of the entire period. Assuming that it is relevant, however, the General Counsel adduced no evidence whatsoever on the subject. All three Respondents denied that such a letter had been sent and the General Counsel has failed to put such a letter in evidence, much less TU's response.

In conclusion, the General Counsel has failed to make out any violations of Section 8(a)(5) and (1) with respect to refusals to provide information, a refusal to bargain over a decision to cease doing business, and the allegation that TU failed to bargain over the effects of the shutdown.[37]

E. *Lisa Hebert*

The General Counsel alleges that Lisa Hebert, a rubber haul driver, was discharged on November 29, 1990, because of her union activities. TU has moved to dismiss the allegations on the grounds that the General Counsel has failed to prove the elements of an 8(a)(3) and (1) violation.

The General Counsel's case consists principally of the testimony of driver Charles Sonnier in which he described conversations he had with RDR's Navarre. There are two curious aspects about the proof. The first is the timing of the incident. It will be recalled that Goodyear had given notice to TU that its leasing arrangement would be canceled at the end of December. That notice had been issued on November 21, only 8 days before Hebert was actually discharged. Thus, TU knew that Hebert, as a junior driver, would probably lose her job by the end of the year, if not before, but so would all the other incumbent rubber drivers and most of the chemical drivers.

That raises the question of why there would be any necessity to discharge an individual because of his or her union activities when the entire operation was about to end. What gain was there, from an antiunion point of view, to dismiss her in advance of everyone else?

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[37] Union Business Manager Ponce's January 15 and 18, 1991 letters to RDR, TU, and Goodyear were not offered in evidence at the hearing before the General Counsel rested. In his opposition to the motions to dismiss, counsel for the General Counsel has appended those letters and the responses thereto to his opposition and moved their receipt. RDR has opposed their receipt on the grounds that they were not offered at the hearing prior to the General Counsel's having rested. Based on the opposition, I decline to receive them even though I am aware that there are certain circumstances where the General Counsel may supplement even his case-in-chief at the rebuttal stage. See *Associated Milk Producers*, 259 NLRB 1033 (1982). Assuming that case is applicable, the fact is that even if received, they would not change the analysis, for there is no showing that the material sought is relevant to the collective-bargaining process. TU has not contended that it was unable to pay the economic demands of the Union; it only contended that the rug was pulled out from under it when Goodyear canceled the agreement. Thus, the business relationship and the income derived therefrom is of no concern to the Union's bargaining stance. It is therefore not producible as part of the duty to bargain in good faith.

The second aspect is the nature of Sonnier's testimony itself. As will be seen, it describes a convoluted plot supposedly advanced to him by Flanary to get rid of both Hebert and her fellow rubber haul driver David Coney. Curiously, the plot only ''trapped'' Hebert, not Coney. What the General Counsel does not explain very well is what motive TU had to go along with Flanary's plan. As we have seen, there is no evidence of union animus on the part of TU. In fact, the opposite may be said to be true. It regularly hired employees with a union background, including Hebert. Another question which Sonnier's plot generates is why Flanary would go to the trouble of setting up Hebert and/or Coney? RDR did not employ these individuals; it only dispatched them. As the facts are described below, it will be seen that neither of these two questions has a satisfactory answer. Indeed, Sonnier and Hebert both suffer from serious, unrefuted, credibility shortcomings.

Sonnier presented himself as both a confused and somewhat embittered individual. He suffers from dyslexia and is unable to read. He possesses the limited ability to copy numerals. He says he learned of the job through a friend who worked as an RDR leased driver on the Beaumont-Lawton interstate run. His testimony is somewhat confused regarding for whom he worked and when he began. He testified that he filled out a Ryder application and subsequently discovered that he was in reality working for TU. However, the evidence shows that he actually worked for both companies. According to Navarre, he hired Sonnier to drive RDR's Lawton rubber run and he did so for 3 to 4 months. At some point, he recommended to Parrish that Parrish hire Sonnier for the Tyler run. It appears both from Navarre and from Sonnier that he then split his time between each company. He acknowledges receiving paychecks from both. Moreover, he confesses to keeping two sets of logs, one for TU and one for RDR, a clear breach of Department of Transportation and Texas Railroad Commission rules. This procedure, of course, enabled him to drive far more hours than he was legally entitled and to maximize his income. As he said, his dyslexic condition limited his abilities in some respects and he was better off driving fixed runs to specific destinations and back. Such jobs, according to him, are hard to find.

He says he first met Parrish while at the Tyler plant. Parrish introduced himself as his ''boss,'' but Sonnier would not accept that assertion, contending that his only bosses were Navarre and Flanary. During that meeting, Parrish gave him a job application form to fill out. When Sonnier told him that he had dyslexia, Parrish offered to help him. Sonnier declined saying he would take it to his girlfriend for her assistance. He eventually did so. Sonnier contended on direct that during the conversation he told Parrish he was falsifying his logs with respect to the time he was spending at Beaumont spotting trailers for loading.[38] He asserts Parrish told him it was okay to do it as long as it was okay with Navarre and as long as he didn't get caught. Parrish denies he ever said such a thing to anybody. It is worth noting that Sonnier failed to include any references to his log falsification in his prehearing affidavit. He says he remembered it shortly before the hearing.

In addition, Sonnier says that at one point Parrish asked him what he thought about the Union and whether he thought the employees would vote the Union in or not. The conversation, of course, implies that it occurred prior to the NLRB election which was conducted on June 6 and 7. His testimony on the point must be disbelieved, because there is no evidence that Parrish had replaced Painter when the election was held. The evidence shows that Parrish did not become regional manager for TU until about a week after the election. Furthermore, even under Sonnier's version, he did not fill out an application for TU until much later. He met Parrish for the first time in Tyler. Sonnier cannot have it both ways and it appears to me that he is either confused or very inventive. Frankly, I think it is a little of both.

After becoming a TU rubber haul driver, Sonnier drove that run until sometime in early November.

He agrees that at all times he opposed union representation. Apparently he believed that the Union's presence would somehow reduce his opportunity to earn a living because of his dyslexia. It is also likely he was against the Union because he thought it would result in a more equitable distribution of the work which would deprive him of the opportunity to earn money through his system of dual log keeping. Whatever the reason, he contends that Navarre and Flanary, sometime before the election, asked him if he would help them find out what the Union's ''demands'' would be.

Later Sonnier had another conversation which he describes as occurring 2 days after the election in the Goodyear cafeteria. He says he opined to Flanary that he would likely lose his job because of the Union's presence. Flanary supposedly replied that he would not lose his job if he didn't join the Union.

Finally, Sonnier says, in November, Flanary told him he was being laid off by TU because of the loss of the Lawton run (by RDR).[39] He professes that Flanary told him he would take care of him. He says Flanary told him that both Hebert and Coney were ''pushing the Union'' and he would set them up to be fired or laid off and then rehire Sonnier. Sonnier says Flanary told him not to worry, that he would be back to work in a short time. He says someone then gave him a TU layoff slip.

With respect to Hebert and Coney supposedly ''pushing'' the Union, Hebert herself gives somewhat ambiguous testimony. She says that sometime in August, in order to maintain union solidarity, she had solicited a returning driver, Mike Howell, to sign an authorization card. She says she did that in the dispatch office in the plain view of both Navarre and Flanary. She concedes, however, that neither said anything about it and the entire incident seems to have been unremarkable.

[38] The Department of Transportation regulations, of course, require the logging of compensated nondriving time. Sonnier claims Navarre told him he was not to log that time. Navarre had been called to testify earlier by the General Counsel as an adverse witness but was not asked questions about logging. As noted earlier, Navarre did say that the drivers who spotted the trailers were performing a job usually carried out by Goodyear employees. TU drivers were asked to perform that task only when Goodyear did not have the manpower to do it. He regarded it as ''extra'' work, i.e., an opportunity for an employee to voluntarily supplement his income.

[39] Sonnier's testimony here makes little sense. The loss of the Lawton route wouldn't have affected Kelly-Springfield's requirements in Tyler, needs which governed that run. Therefore I do not credit his attribution to Flanary for such a reason.

Sonnier, eager to get back to work, said nothing to Hebert or anyone else about Flanary's apparent plot to rid himself of both Hebert and Coney. On November 29, Parrish did fire Hebert for falsifying her log on a run she made between Beaumont and Tyler on November 19–20. Shortly thereafter, Sonnier was recalled to the Beaumont-Tyler rubber run. This time, however, he was asked to perform that task from Houston. I find that situation did not last very long as he was almost immediately the victim of the general layoff of December 16 and the reassignment of the four senior drivers from the chemical runs. Those four were assigned to run rubber as a result of the Union's agreement with TU.

Sonnier admits to being bitter over this situation and believes Flanary reneged on his ''promise'' to take care of him as a dyslexic person. He thinks his treatment was morally wrong and seems to hold a grudge against anyone who might be deemed his employer. He does not distinguish between RDR and TU in this respect. It appears that this situation has led him to now be more angry with the employers then he had previously been fearful of the Union.

In any event, Hebert testified that she believed she had been set up for discharge. Her union activities, however, were well known, open, and had been singularly ignored. Even her job application showed that her most recent 6 years of employment had been through the Union's hiring hall.

She had been hired on February 15, 1990, and initially assigned to chemical hauls. She testified that she did not fill out a job application until several months had passed. She then said the job application form and the connected documentation were all backdated to February 15.

She worked as a TU chemical hauler from February 15 through April 15, when, during a meeting between herself, TU's Painter and Navarre, she was given a layoff for lack of work. She asserts it was Navarre who told her she was being laid off, pointedly ignoring Painter's presence.

Nonetheless, she says Navarre told her that she would probably be recalled shortly because they were contemplating reducing the demurrage rate and he expected some of the drivers to quit. It didn't happen right away and on April 26 she learned from fellow driver Aubrey Cain that the drivers had gone to seek representation by the Charging Party. That induced her to call Negrey in Cleveland to complain that she hadn't been called back as she believed she had been promised. She also told Negrey that the drivers were seeking union representation. He said he would check into it. Shortly thereafter Negrey telephoned her and told her to talk to the dispatch office as she was being recalled. She did and was immediately returned to work.

The Union sent TU two letters, the first dated April 18, 1990, and the second June 7, 1990. Each advised TU who its organizers were. The April letter did not contain Hebert's name, but the June 7 letter did; not only did it list her, it listed 15 other drivers, including Earnest Hebert, her husband.

Clearly, by the time she asked Mike Howell in August to sign an authorization card, her union participation was old news.

However, her testimony about the backdating of her job application and related forms seems to carry with it the suggestion that TU had hired her without knowing about her union background. Under her scenario, she did not tell TU anything about her union sympathies until well after she had been hired. Another testimonial motive may have been to demonstrate that there was confusion as to who her actual employer was, enhancing the argument that she was employed by both RDR and TU. She even believes that her April 15 layoff was motivated by her union membership. Yet there is nothing to support that belief.

Although she contends the documentation was backdated, the documents themselves, as well as her own testimony, belie it. She says at some point, perhaps as late as June, Flanary and a clerical named Mary sat her down at a table at the Ryder Truck yard in order ''to update'' her personnel file. She says it was at that time that she filled out all of the hiring paperwork and they directed her to backdate the documents to February 15, 1990. She says the excuse they used was so she would not lose her seniority.[40] She says she filled out her job application form for TU (on a TU form), an acknowledgement that she had received a copy of TU's driving rules and regulations, an I-9 form (required by the Immigration and Naturalization Service), a form entitled ''Notice to Drivers and Driver's Certification of Non-Motor Carrier Compensated Work,'' and finally, a TU form entitled ''Data Sheet for Temporary Employees, Casuals and New Hires.'' All of the documents are filled out in pencil, as was the one document which she admits filling out on February 15, the W-4 form, which does not bear a date. Neither does the data sheet for new hires.[41] Because of her use of pencil on all of these hiring documents, I conclude they were all filled out at the same time and that it was on the date shown, February 15, 1990. With respect to the I-9, I note that TU Official Jack Painter certified that he had seen the supporting documentation. His certification is in ink and he dated it February 28.[42]

I am compelled to conclude, based on the discrepancy between Hebert's testimony and the documentation, that she has not told the truth here. Apparently she wishes me to believe that TU regularly counsels and condones the falsification of paperwork. That, of course, becomes significant when we look at the reasons which Parrish later gave her for her discharge.

It is undisputed that Hebert knew TU's rule that discharge was the appropriate discipline for falsification of logs and other paperwork. See driver's rule 2.16 which provides that the only available discipline for that particular offense was

[40] I find that to be a peculiar excuse. Hebert's seniority, even if her personnel file was somehow empty, would never be in question. The payroll records clearly show when TU began to pay her; her seniority was easily provable.

[41] The data sheet is a log supplement. It is designed to inform TU of the current driving eligibility status of a driver at the time of hire. It would include driving hours during the previous week so that one may determine how quickly a driver could be assigned a load. She wrote on that document that she had not worked for 5 of the previous 7 days and wrote that on the first 2 days of that week she had worked for 4-1/2 hours each day. She claims that when she filled out the document in June she was able to remember that was her status as of February 15. I do not credit her on the point.

[42] Hebert says the documents which she presented for use on the I-9, her Texas driver's license and her social security card were photocopied by TU. It may be true that Painter did not complete his portion of the I-9 form until after the INS deadline, but nonetheless there is nothing irregular about his signature and his date. Clearly, the document on its face evidences its existence during the month of February.

discharge. Second, she acknowledged, in an affidavit given during the investigation (but would not do so readily before me) that during an August 1990 safety meeting, Parrish advised her and the three other rubber run haulers that they would be subject to discharge if they falsified their logs. Furthermore, he urged them to call him in the event that any RDR dispatcher or supervisor asked them to run illegally so he could step in to prevent it.

In mid-November, according to Hebert, Flanary did exactly that. She says he told her that on the days preceding Thanksgiving all the rubber run drivers would be expected to run back-to-back loads to Tyler so the Kelly-Springfield plant there would have sufficient crude rubber on hand immediately after Thanksgiving.

She testified:

> And I asked him. I said, what do you mean, back-to-back? And he said, you know, back-to-back. And I said, well, how do you expect me to do that, Harold, because it—I have run out of hours. And he said, well, you will have to doctor your logs. You do know how to doctor your logs; all truck drivers know how to doctor their logs. And I said, what do you mean? And he said, you know what I mean. He said, if you won't do it, I will find someone else who will.

She said that she feared for her job so she decided that she had better do it. As a result, on November 20–21 she ran two round trips to Tyler without taking an 8-hour break as required by both the Department of Transportation and the Texas Railroad Commission. In addition, she falsified her log to show that she had taken such a break. She did so, she says, because she believed fellow rubber run driver and friend David Coney had done so ahead of her. In fact, however, Coney had taken an 8-hour break and had run legally that day. There is nothing to suggest that Hebert could not have done likewise.

When she returned, RDR dispatcher Tammy Mancil immediately became aware of what she had done. Mancil, on her own, reported the incident to Parrish at his office in the Dallas area. Parrish then proceeded to investigate the matter. Mancil faxed Parrish copies of Hebert's logsheets together with the checkin and checkout times at Beaumont. He later compared these with the checkin and checkout times at the Tyler plant and concluded Hebert had falsified her logs.

Parrish called her on November 29. During that conversation she admitted she had falsified the log and had run illegally. He thereupon advised her that she was terminated. She asserted that others had done so, citing her mistaken belief that Coney had run also illegally. Parrish advised her that she should be concerned with what she had done, not with what others had supposedly done.

For reasons not clear to me, Parrish drafted and sent two separate letters to Hebert on November 29. In one he simply advised her that she was being discharged for breach of work rule 2.16, the rule against falsifying work records and logs. In the second he detailed the evidence which he had uncovered, describing the actual departure and arrival times, noting that she had not taken the 8-hour break.

Parrish also telefaxed a copy of at least one of those letters to the RDR dispatch office. On the transmittal sheet accompanying the message he wrote the word ''Enjoy!'' I conclude that he knew the RDR officials would not be unhappy to see Hebert depart.

In analyzing the foregoing facts, I find that the General Counsel has not only failed to prove all of the elements of a violation of Section 8(a)(3) and (1), he proved TU's defense. First, there is no credible evidence that TU harbored any union animus. Moreover, it seems that TU maintains hiring policies which do not concern themselves with whether an employee was likely to have been a union member. Indeed, Hebert had worked almost 6 years through the Union's hiring hall and the hiring officials knew it, whether they were TU officials or RDR officials. In April they put her back to work knowing that union organizing was underway. Later, they did not concern themselves when the Union announced her as one of the union organizers.

Her union activities appeared to have been absolutely minimal, soliciting one card from employee Mike Howell in August in plain view of the two RDR managers. They said nothing to her at the time and there is no evidence that the incident was ever reported to Parrish. The timing of her discharge is not connected to any union activity on her part nor any union activity on the part of any other employee. At that time, TU was in the process of negotiating a collective-bargaining contract and that process seemed to be going smoothly. She was not a part of the negotiating team nor was she any more visible than the majority of the drivers who had voted for the Union.

The only nexus to her discharge is her admitted falsification of the log on November 20–21. In a sense, not only was it an offense for which she knew she would be discharged, it was also an act of insubordination. She had been told in August that she was to report to Parrish any effort to force her to drive illegally. Instead of calling Parrish to get a clarification of Flanary's request, she chose to commit the driving violation and to falsify the records to cover it up. Even if Flanary was baiting for Hebert, as Sonnier contends, there is nothing which prevented her from either reporting the matter to Parrish and getting a clarification or doing what Coney did, take the 8-hour break between runs. The choice of running illegally was hers, not anyone else's. Similarly, the decision to falsify the logs was hers, not anyone else's.

The only evidence which really supports the General Counsel is that given by Sonnier who testified that Flanary had told him that Hebert and Coney were ''pushing the Union'' and he would find a way to get rid of them so that Sonnier could be put back to work. Sonnier, however, is not a credible witness. Both he and Hebert are prone to excessive exaggeration, if not downright prevarication. The entire scenario which Sonnier described is so unlikely that it is suspicious on its face. When that is added to his confusion and bitterness, his story must be rejected.

Finally, again assuming that Flanary was attempting to trap her, there is nothing to suggest that Parrish knew that was the case. Flanary did not report the incident to Parrish. The undisputed testimony is that Mancil did it on her own. In fact, Navarre was off ill during that period of time and Flanary had not come to work either. Thus, if those individuals were seeking to engineer her discharge for an illegal purpose, there is no evidence that Parrish was aware of it. He made his decision based on facts which he found during his investigation. Under company rules he was left with no choice but to discharge her.

Thus, applying the *Wright Line*[43] analysis, even if the General Counsel had made out a prima facie case that the discharge was for an illegal reason, the General Counsel also demonstrated that the discharge would have occurred absent any illegal purpose.

In conclusion, I find that the elements of animus and timing are missing. Indeed, the element of union activity, although present, is somewhat stale. Finally, with respect to a lack of animus, I note that the Board has held in *Sun Coast Foods*, 273 NLRB 1642, 1644 (1985), that an affirmative showing that an employer lacks animus against the union constitutes a good defense. The General Counsel's own evidence establishes that TU had no animus. Accordingly, I conclude that Respondents' motion to dismiss with respect to Hebert should be granted.

F. *Independent 8(a)(1) Allegations*

At the outset, I express my agreement with counsel for the Ryder respondents that ''the procedural history of this case has been mazy series of charges, amended charges, second amended charges and amended complaints, winding around time frames and respondents, to the ultimate destination of 21-page amended consolidated complaint naming five respondents as joint employers and alleging numerous violations of Section 8(a)(1), (3) and (5) of the Act.'' The first charge, Case 16–CA–14820, was filed on November 20, 1990, solely against Goodyear. This occurred during the course of collective bargaining between TU and the Union, shortly before Goodyear officially notified TU that the leasing contract would not be renewed, during the rumor stage. The charge alleged that Goodyear had committed a violation of Section 8(a)(5) and (1) of the Act by engaging in conduct constituting a refusal to bargain. The second charge, Case 16–CA–14838, was filed on December 7, 1990. In it the Union asserted that TU and Goodyear were joint employers who had committed violations of 8(a)(3) and (5). The 8(a)(3) allegation dealt with TU's recent announcement that the chemical drivers would be laid off on December 16. The Section 8(a)(5) portion accused both these Respondents of refusing to bargain by declining to provide the Union with certain information concerning the proposed termination of the chemical hauling operation. On December 27, the Union amended the first charge, Case 16–CA–14820, by adding TU to the initial refusal-to-bargain charge against Goodyear.

None of those charges assert that any Respondent had committed any independent act in breach of Section 8(a)(1). Indeed, the initial complaint in Case 16–CA–14820, issued on January 4, 1991, alleged only that Goodyear and TU were joint employers which had breached the good-faith bargaining obligation.

It was not until it filed the charge in Case 16–CA–14901, on February 8, 1991, that the Union contended that RDR was involved at all. Again, however, it contended only that TU, Goodyear, and RDR were joint employers who had breached Section 8(a)(3) and (5) of the Act relating to the layoff of the chemical drivers. It does contain some vague language which might have been construed as independent 8(a)(1) activity, but that language was ultimately deleted in the first amendment of March 28.

In the meantime, on March 6 the Union filed a second amended charge in Case 16–CA–14838 alleging that TU and Goodyear as joint employers had unlawfully discharged the chemical drivers, refused to bargain over the decision to terminate them and had failed to bargain over the effects of the termination. That was promptly followed by the second consolidated amended complaint on March 12, 1991, consolidating Cases 16–CA–14820 and 16–CA–14838.

Additional amendments and new charges continued to be filed, but it was not until the second amended charge was filed in Case 16–CA–14994 on May 22, 1991, that any contention was made that any Respondent had committed an independent violation of Section 8(a)(1). In that amended charge the Union contended that RDR's Flanary had made an unlawful threat sometime during the first week in December 1990. Also pending at that time was Case 16–CA–15045, originally filed on May 13, 1991. On June 18, 1991, that charge was amended and contains, for the first time, a list of 8(a)(1) allegations. They accuse RDR's Navarre of independent 8(a)(1) allegations beginning more than a year previously, May 28, 1990, and continuing through November 1990. It also contained an allegation that TU's Parrish had committed two independent acts violating Section 8(a)(1) on July 6, 1990.

The fourth amended consolidated complaint picks up some of these allegations. Respondent RDR has moved to dismiss most of them on the grounds that they are barred by Section 10(b) of the Act as having been alleged to have been committed long before the 6-month statute of limitations began to run.

The General Counsel does not address very well the 10(b) issues, asserting only that the 8(a)(1) allegations first alleged in May 1991, are somehow connected to the original case filed on November 20, 1990 against Goodyear or the second case, Case 16–CA–14838, filed on December 7, 1990, against Goodyear and TU. Neither of those charges however alleged that RDR was in any way involved. Nonetheless, the complaint asserts that it was RDR's Navarre and Flanary who committed the bulk of these independent violations. The General Counsel's argument here necessarily depends on a finding that a joint employer relationship existed and service on one of the joint employers is service on all.

Even if a joint employer relationship had existed, and I have earlier found that it did not, neither of those first two unfair labor practice charges contended that any manager had committed independent violations of Section 8(a)(1). The principal thrust of those two charges is that Goodyear and TU breached the good-faith bargaining obligation in some respect. The second dealt with the mass layoff of the chemical drivers, an alleged violation of Section 8(a)(3). Although it is certainly true that independent 8(a)(1) violations can be used to assist in the proof of an 8(a)(3) violation, the Board, in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), held: ''[W]e can find no sufficient basis in law or policy for continuing to exempt 8(a)(1) complaint allegations from the requirements of the traditional 'closely related' test. On the contrary, we believe that a uniform requirement in all 8(a) cases that a complaint allegation be factually related to the allegation in the underlying charge would end the disparity currently existing in our case law and promote important statutory policies.'' It went on to say that it would no longer permit the boilerplate ''other acts'' language found in the

[43] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

charge forms to be sufficient to sustain a complaint allegation under the specificity requirement of Board Rule 102.12(d).

Clearly the *Nickles* rule has application here. First, the fourth amended consolidated complaint alleges that RDR's Navarre committed acts violating Section 8(a)(1) on May 21, 1990. Specifically, paragraphs 7(B)(1), (2)(a), and (3) assert that RDR unlawfully interrogated employees, solicited employees to spy on other employees, and threatened employees with discharge for reasons prohibited by the Act. The charge in Case 16–CA–14820 filed on November 20, 1990, alleging only a technical refusal to bargain against Goodyear would never rely on such evidence for proof of that fact, assuming that the correct employer had been named. The second charge, Case 16–CA–14838, originally filed on December 7 against TU and Goodyear, does make an 8(a)(3) allegation. Counting 6 months backwards from that date, one discovers that Navarre's supposed activity on May 28 is about a week outside the reach of Section 10(b). That is not to say that the conduct might not be received as background evidence for animus, but clearly it is on its face outside the reach of the Act for 10(c) remedy purposes.

It was not until February 8, 1991, that the Union filed any charge against RDR. Counting 6 months backwards from that date, the 6-month period for a timely charge begins on August 8, 1990. Using that date as the cutoff it is apparent that Navarre's alleged misconduct occurring on June 13 and 23 are barred. Indeed, that charge, Case 16–CA–14901, contains no independent allegations of Section 8(a)(1) and would rely on those allegations to support the 8(a)(3) conduct alleged in the second amended consolidated complaint dated April 9, 1991. In that complaint the General Counsel for the first time alleged that the November 29 termination of Lisa Hebert was unlawful as well as the December 16 layoff of the chemical drivers.

Strangely, the General Counsel's proof relates to incidents directed not at the chemical drivers and not at Hebert, but at nonunit employees, the RDR dispatchers. In that circumstance, I do not see how the ''closely related nexus'' required by *Nickles Bakery* has been met. It cannot be overemphasized that Navarre, although a statutory supervisor, did not have supervisory authority over any of these drivers. Indeed, the Board has recently held in *Crenulated Co.*, 308 NLRB 1216 (1992), that in order to be a statutory supervisor, an individual must exercise supervisory authority ''over the employees of the employer at issue,'' not over the employees of some other employer. Thus, Navarre's remarks to his own dispatchers would not fit within the nexus requirement insofar as TU's November 29 discharge of Hebert or its December 16 discharge of the other chemical drivers is concerned. That, of course, leaves open the question whether the remarks made to the RDR dispatchers would met the nexus test.

Before answering that question, it is important to look to the evidence which counsel for the General Counsel actually adduced. The allegations may be grouped by allegation date—June 13 and 23, 1990.[44] In general, these paragraphs assert that Navarre directed remarks to dispatchers Bossette, Mancil, and Bacon. Specifically, those individuals testified that Navarre asked them to spy on employee union activity; threatened them with discharge if they revealed that they were spying; threatened, somewhat vaguely, to impose more onerous working conditions on drivers because they had selected the Union; that the dispatchers had to play by his rules or be discharged; that the dispatchers were to deny the use of the telephones to the drivers and if they didn't comply, the dispatchers would be subject to discharge; and a vague threat of reprisal directed at Sonnier in late June.

As can be seen none of this was related to any union activity by or on behalf of the dispatchers. At best Navarre was seeking to obtain information about the activities of the drivers; at least some of his threats to discharge dispatchers if they didn't play by his rules could be regarded as aimed at their subsequent discharge.

The evidence in support of that contention, however, came up in a conversation between Bossette and Navarre in which they were discussing drivers' complaints regarding alleged dispatcher favoritism. She says Navarre told her the Union was out to ''hurt'' the dispatchers (apparently because they represented the drivers' interests, not those of the dispatchers) but he would not allow the Union to do that, at least as long as the dispatchers played by ''his rules.'' If they did not, they would be subject to discharge.

I agree that the remark carries with it the threat of a discharge but do not see how the threat was in any way unlawful. Indeed, earlier in her testimony Bossette says Navarre told her that eventually the Union would issue a handbook (apparently a collective-bargaining contract) which would likely govern dispatch rules and the dispatchers would have to learn it. Those appear to be the ''rules'' to which he was referring.

The entire matter seems to be relatively benign; certainly the allegations dealing with spying, even if credited, would have nothing to do with any subsequent discharge in December. I observe that the General Counsel has not even contended that the dispatchers were discharged as a reprisal for anybody's union activities, only that they were the incidental victims connected to the supposedly unlawful discharge of the drivers. Thus, I do not see any nexus which these independent 8(a)(1) allegations have to the 8(a)(3) and (5) charges then on file. Accordingly, these allegations must be dismissed as being outside the scope of Section 10(b) of the Act.

Also occurring within the same time period, according to paragraphs 7(C)(1) and (2) of the fourth amended consolidated complaint (based on the June 18, 1991 amended charge) are two contentions that TU's Parrish violated the Act on July 6, 1990, by creating the impression of surveillance and threatening to discharge an employee because of the employee's union activity. Even though this allegation is facially untimely, the evidence in its support also fails, even as background evidence of animus.

According to driver Charles Zerengue, on or about July 5, 1990, he got a message to call Parrish. He finally reached him on July 6. Zerengue says Parrish asked him about a report he had just received accusing Zerengue of going through Navarre's files and paperwork on Navarre's desk. Zerengue denied doing that, but explained that he was at Navarre's desk attempting to find some information relating to a supposed paycheck shortage, saying the dispatcher had been unable to help him. He says Parrish told him he had also heard that Zerengue had refused to take a sample of the product

[44] Complaint pars. 7(B)(2)(b), (4), (5), (6), (7), (8), (9), and (10).

he had hauled to the lab, observing that Zerengue seemed to be some sort of troublemaker.

The conversation then turned to a letter which Zerengue says Parrish told him he had obtained. Zerengue says Parrish told him he had received a letter in the mail which Zerengue had supposedly signed telling the union drivers not to associate with or talk to any nonunion drivers on the job. Zerengue denied being involved in any such letter and asked for a copy. He says Parrish told him it was not necessary to give him a copy but that if he found out Zerengue had actually written such a letter he would ''personally fly down there and escort you out of the plant.''

The General Counsel asserts the incident constitutes both the unlawful creation of the impression of surveillance and an unlawful threat to inhibit Zerengue's union activity.

First, I observe that the entire conversation seems very unlikely. If one credits Zerengue that he never wrote such a letter, there would be no impetus for Parrish or anyone to accuse him of having done so. Second, if the letter is as Zerengue says, then it would not constitute a protected act. It is improper for an employee to direct other employees to ostracize, shun, or refuse to talk to other employees because of their nonunion status. That in and of itself is disruptive of the production process and is a matter with which an employer has a direct concern, for it is a severe burden on employee discipline, morale, and productivity. In essence, it is a direction by one employee to others to hamper or impair production.[45] It is conduct which is not protected by the Act.

Not being protected by the Act, it is not unlawful for an employer to inject itself into that circumstance and it does not create the unlawful impression of surveillance when it does so, for there is no protected conduct involved. Similarly, the threat to discharge an employee for such conduct is perfectly proper, again because the conduct is unprotected. Therefore, the General Counsel's proof here falls far short of 8(a)(1) activity by Parrish. It certainly does not have the reasonable tendency, in the totality of the circumstances, to intimidate an employee from exercising his Section 7 rights.

Moreover, this conversation would have no bearing on proving unlawful the discharges of Hebert or the chemical driving crew some 5 months later. Hebert's discharge is alleged to be the result of plotting by RDR personnel and the chemical driving staff's discharge to be the result of Goodyear's supposed unlawful decision. There is no way that a claim of ''creating the impression of surveillance'' of probably unprotected conduct would assist in the proof of animus with respect to those two alleged 8(a)(3) violations. Thus, because the Union did not specifically designate this July 6, 1990 telephone conversation in a unfair labor practice charge until the second amended charge in Case 16–CA–15045 was filed on June 18, 1991, it, like the previously discussed dismissals with respect to RDR's supposed conduct, must be dismissed on 10(b) grounds. But even if not, the merits are unimpressive. There is no suggestion that the conduct was in anyway coercive of the right to engage in lawful Section 7 activity. It was only aimed at the unprotected act of causing disharmony in the bargaining unit.

There remain for consideration three allegations involving Navarre and two involving Flanary. Complaint paragraphs 7B(11), (12), and (13); 7A(1) and (2). Taking them chronologically, the allegations involving Navarre precede those involving Flanary. Thus, paragraph 7B(11) asserts that between September and December 1990, Navarre told employees that Goodyear would not stand for a union in the plant and would not allow the Union to tell it how to run its transportation department. The General Counsel relies on the testimony of three individuals, Bossette, Bacon, and Sonnier to prove this allegation. Sonnier's testimony relates to a conversation which occurred about a week after the election, sometime in mid-June. It, therefore, is outside the scope of Section 10(b) of the Act.

Bacon testified that a few weeks after she was hired in early July, Navarre told her in Mancil's and Broussard's presence that the drivers had voted for the Union and that Goodyear was not going to stand for the Union coming in and telling them how to run their transportation department. He also said, ''It just wasn't going to be.'' As with Sonnier's testimony, the incident is well outside the 10(b) period, having occurred in July 1990.

Bossette testified that sometime in October she had a conversation with Navarre in the dispatch office. Also present, but not clearly involved in the conversation, was a Goodyear ''operator'' (a rank-and-file employee who loads tanker trucks). She remembers Navarre saying the ''drivers were stupid for voting in a union, that they didn't have sense enough to be in a union and that Goodyear was not going to stand for a union in a nonunion plant.'' He also said that the drivers who had voted against the Union as well as the dispatchers were all going to have to suffer for the Union; that they would all be out of a job because of it.

Whether the conduct is barred by Section 10(b), it also lacks merit. The Board has held a nearly identical remark to be uncoercive and not unlawful. See *Mountaineer Petroleum*, 301 NLRB 801 (1991). There the Board did not find the remark to suggest that the employer would not recognize a union because it was the lawful expression of an opinion. Likewise, Navarre's remarks are also in the context of an opinion. Here his conjecture is directed at what Goodyear might do, something neither RDR nor TU could control. Because they had no control, his remarks must be regarded as uncoercive.

Paragraph 7B(12) alleges that in November 1990, Navarre created the impression of surveillance by listing the names of unit employees according to their alleged union preference. In support of that allegation counsel for the General Counsel cites dispatcher Bacon's testimony that in November, or possibly before that, she observed Navarre making notations on a computer printout. She says he marked which of the drivers had voted for and which of the drivers had voted against the Union in the June election. At the same time he showed her the list, he told her that the principal troublemakers were the ''union stewards,'' Rains, Zerengue, and Aubrey Cain.[46]

[45] See *Consolidated Edison Co.*, 280 NLRB 338, 339 (1986), which held that an employer has the right to investigate apparent efforts of an employee to disrupt the work of other employees. Also, *Washington Adventist Hospital*, 291 NLRB 95, 103 (1988); and *BJ's Wholesale Club*, 297 NLRB 611, 616 (1990) (management may tell a prounion employee to stop threatening employees about their union stances).

[46] It should be observed here that there is no evidence any of these three were actually union stewards.

As noted, the election had been in June, well before Bacon had even been hired. Assuming she is accurate, that the incident which she described occurred in November, there seems to have been no reason for it. The Union had been certified as the representative of TU's employees and the rumor regarding the substitution of a common carrier was in high gear. Depending on the date in November, it may well be that Goodyear had already advised TU (and RDR as well) that TU's agreement was being canceled. Thus, the likelihood that Navarre would be listing employees by union preferences is virtually nil. Furthermore, the allegation itself asserts that his conduct constituted the creation of the impression of surveillance. Yet, his remarks were directed not at the individuals who were engaged in union activity, the drivers, but at one of his own dispatchers. Even if he said the three drivers were union activists, I fail to see how the remark is coercive. RDR dispatchers such as Bacon were not engaging in any union activity nor was there any reason for Navarre to be attempting to interdict her in doing so.

If Bacon actually observed the incident much earlier, say in July shortly after she arrived, a more probable date, the matter would be barred by Section 10(b). Accordingly, because I doubt it occurred and I do not see that this could have had a coercive effect or because it is barred by Section 10(b), this allegation should be dismissed.

Paragraph section 7B(13) asserts that in late November Navarre threatened employees with discharge because the unit employees had selected the Union as their collective-bargaining representative. Again, we have the testimony of three dispatchers, Bossette, Mancil, and Bacon. At this point it should be noted that Goodyear had clearly given TU (and RDR) notice of the cancelation. The Union was aware of it as well. It is not necessary to detail the testimony of each of these three individuals. Suffice it to say that they all testified Navarre told them the reason that the layoff had been announced was because the drivers had selected the Union as their representative. Similarly, in support of complaint paragraph 7A(1), drivers Morgan and Rains testified that RDR's Flanary had told them that they had made the ''wrong decision'' and had voted the wrong way. In Flanary's opinion he would rather have had his job than the Union.

In context, it is clear that even if the remarks were made they were simply the expression of Navarre's and Flanary's assessment of why the layoffs were coming. Of course, neither of them was involved in the decision-making process; all they knew was that everyone's job, including theirs, was in severe jeopardy. In fact, Navarre lost his shortly after his drivers and dispatchers did. Only Flanary managed to survive. Thus, the evidence clearly shows that these remarks are the angry reactions of individuals seeking an explanation for why their jobs had been lost. It is accurate to observe that one could look at the statements, standing alone, and say they are not couched as opinions, but as fact. Nonetheless, in context that is clearly not the case. They cannot reasonably be regarded as coercive in the totality of the circumstances. The General Counsel has failed to make out a violation here.

Finally, complaint paragraph 7A(2) asserts that in January, during a telephone conversation, Flanary threatened a driver with discharge because the drivers had selected the Union as their collective-bargaining representative. In support, the General Counsel cites driver Jonathan Rains' testimony.

Rains had previously been an isoprene driver and had been transferred to the rubber run as one of the four most senior drivers when the chemical operation was shut down. In fact, he was really driving to Tyler from Houston as the dispatching operation had been transferred to that location. He says that sometime in January he had called Flanary after having reached Tyler to let him know he was returning. He says Flanary asked him how well he knew the Beaumont drivers on the rubber route. He said he knew them very well; he had worked with them for 5 years. Rains says Flanary then told him, ''You better go over there and talk to them and tell them to hold their union activity down over there, or we will be back in shape to lose [this account] . . . wind up losing this account over the union activity.''

Again, we have an RDR person making a remark to a TU driver which is apparently coercive. In essence it is a direction to Rains to ask his fellow drivers to cease their union activity. The principal problem with it is Flanary is not Rains' supervisor. In fact, it is not clear that he is a statutory supervisor at all; more likely he had become a rank-and-file dispatcher, for his supervisees had been discharged in Beaumont in December and he had been forced to move to Houston. Based on the doctrine of *Crenulated Co.*, supra, it seems unlikely that at this point Flanary was a statutory supervisor. First, he was not Rains' supervisor and, second, it is not clear that he had anybody at all to supervise, not even RDR employees. See *Browning-Ferris, Inc.*, 275 NLRB 292 fn. 5, (1985).

Accordingly, all of the allegations found in paragraph 7 are either barred by Section 10(b) of the Act or are not supported by the evidence. Under the circumstances, I am unable to find that the General Counsel has established sufficient evidence to warrant requiring any Respondent to defend them.

Conclusions

Based on the foregoing, I conclude that the General Counsel has failed to demonstrate a prima facie case with respect to the entire complaint. First, there is no evidence that Ryder Truck or Ryder System, Inc. was involved in this case whatsoever. Those respondents should be dismissed without further ado. Second, the General Counsel has failed to establish a prima facie case that Goodyear and/or RDR were joint employers with TU of the chemical haul drivers. Counsel for the General Counsel has failed to establish that Goodyear or RDR shared and codetermined the essential terms and conditions of employment of these drivers. In fact, he has shown the contrary, that the essential terms and conditions such as hiring, firing, wages, fringe benefits, and discipline were ultimately in the hands of TU.

Third, the General Counsel has failed to demonstrate that any party has failed to bargain in good faith over any mandatory subject of bargaining. Clearly, neither Goodyear nor RDR had any duty to bargain with the Union. Furthermore, TU had no duty to bargain over the decision to go out of business. See *First National Maintenance Corp. v. NLRB*, 450 U.S. 666 (1981). Nor does it appear that the Union ever pursued, after the postponement, its demand that TU bargain over the effects of the chemical haul shutdown. Even so, the evidence demonstrates that the TU did bargain over some ef-

fects, i.e., which employees would be retained on the rubber run. And, there is no suggestion that TU did not unlawfully refuse to supply material which the Union had requested. Either the Union already had it or the material was not available to TU at the time and the Union knew it.

Fourth, the General Counsel has not established that the December 16 layoff of the chemical drivers was motivated by antiunion considerations; instead the only evidence in the record is that it was the result of Goodyear's decision to cancel the leased drivers' arrangement with TU in favor of substituting a common carrier. This scenario is consistent with the plan which Goodyear had conceived in 1985 and which finally came to fruition at the end of 1990. Fifth, counsel for the General Counsel failed to establish a prima facie case with respect to the discharge of Lisa Hebert, for significant elements of the violation are absent. Instead, he has demonstrated that Hebert's discharge followed immediately on the heels of her falsifying her logbook, an offense for which discharge was the only penalty under TU's rules. Sixth, the General Counsel failed to establish a violation with respect to all of the allegations alleging Section 8(a)(1). Either they are barred by Section 10(b) or the evidence is too vague and insufficient to warrant the entry of a Board order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

It is ordered that the matter be dismissed.[48]

IT IS FURTHER ORDERED that any pending motions inconsistent with this order of dismissal are denied.

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[47] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[48] A request for review of this order may be filed pursuant to Sec. 102.27 of the Board's Rules and Regulations.